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No._____

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In The

Supreme Court of the United States

October Term, 1983

FRANK FOOLS CROW, etc., et al.,

Petitioners,

vs.

TONY GULLET, etc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

(1) In resisting a Free Exercise challenge, is it sufficient for a State merely to allege a rational basis for its actions, without alleging and proving both public necessity and the absence of less restrictive alternatives?

(2) Is the licensing of religious activities invalid *per se*, or must the burden on free exercise be proved, theologically, by religious practitioners?

(3) Does the public display of a particular denomination's religious activities, involuntarily and to the detriment of Free Exercise, also violate the Establishment Clause?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Frank Fools Crow and others, as representatives of the class of persons practicing the Lakota (Sioux) and Tsistsistas (Cheyenne) religions, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court in this case is reported at 541 F. Supp. 785 (D. S. D. 1982), and reproduced in the Appendix (App. 1a). The opinion of the Eighth

Circuit, not yet officially reported, is reproduced in the Appendix (1b), together with the orders affirming the District Court's judgment and denying Petitioners' motion for rehearing *en banc* (1c, 1d).

JURISDICTION

The Eighth Circuit affirmed the District Court's judgment on May 10, 1983, and denied Petitioners' motion for rehearing *en banc* on June 14, 1983. This petition for certiorari was timely filed within 90 days of the last date. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; . . .

Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction of the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

42 U. S. C. § 1996:

> It shall be the policy of the United States to protect and preserve the American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, . . . includ-

ing but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

STATEMENT OF THE CASE

This was an attempt to enjoin the State of South Dakota and its employees from developing Bear Butte for tourism and recreational camping. Since time immemorial, Bear Butte has been the principal ceremonial site for practitioners of the Lakota and Tsistsistas religions, and has always been central and indispensible to the major ceremonies of the life cycle and the seasonal cycle of the year. "Bear Butte is so sacred we cannot live without it," explained Lakota plaintiff and medicine man Pete Catches (Jt.App. p. 103).* "It is there that medicine men receive their powers." According to plaintiff Larry Red Shirt,

> the original instructions of the Lakota [were] given by the Creator on a sacred mountain similar to the way the Ten Commandments were given to Moses on a mountain. . . . [T]he Lakota people originated in the Black Hills and [the] sacred instructions given to us by the Creator were given to us on Bear Butte. This makes Bear Butte the central and most sacred mountain to the Lakota people.

(Jt.App. pp. 36-37). The Sacred Buffalo Calf Pipe of the Lakota came from Bear Butte, and is most powerful when used there. Plaintiff Arvol Looking Horse is the 36th Keeper of the Pipe since the Lakota received it more than nine centuries ago.

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*"Jt.App." refers to the Joint Appendix of the parties on appeal to the Eighth Circuit, which includes affidavits and the transcript of the June 18, 1982 hearing on plaintiffs' (Petitioners here) request for a preliminary injunction.

Bear Butte is at least equally significant for the Tsistsistas. "Nowahwus [Bear Butte] is the holy mountain of the Tsistsistas," plaintiff Laird Cometsevah told the district court. "Each Tsistsistas makes at least one religious pilgrimage to Bear Butte" during his lifetime (Jt.App. p. 23), just as Moslems make at least one pilgrimage to Mecca, because "the Four Sacred Arrows of the Cheyenne came from within Bear Butte as a covenant with the Almighty God Maheo."

> Bear Butte is the holiest place to the Cheyenne people, who use the mountain regularly for pilgrimages, and who think about it every day, and who mention it in their prayers.

(Plaintiff Walter Hamilton, Jt.App. pp. 25-26), as Jews refer to Jerusalem in their prayers. In short, Bear Butte is both Jerusalem and Sinai to the Sioux and Cheyenne.

Some 4,000 Lakota and Tsistsistas worshippers visited the Butte in 1981, the year before the commencement of this action. Bear Butte's religious importance was stipulated by Respondents and noted by the district court in the course of the proceedings (Jt.App. pp. 94, 163, 186, 188). This is not a case, then like *Badoni v. Higginson*, 638 F. 2d 172 (10th Cir. 1980), or *Sequoyah v. Tennessee Valley Authority*, 620 F. 2d 1159 (6th Cir. 1980), where Indians' religious interest in a site was historical, incidental, or limited to infrequent use by a few medicine men.

Seclusion and solitude are indispensible to Lakota and Tsistsistas ceremonies. "When we go on a fast," medicine man Catches explained, "we wish to be excluded from the world" (Jt.App. p. 108). Noise, traffic, and interruption "interferes with all participants of the vision quest because

it distracts the person who is seeking the vision as well as his supporters; it interferes with communication with the spirit world; and destroys the strength of the ceremony itself" (Jt.App. p. 39). Spiritual concentration also requires that the mountain itself retain its natural topographic unity, free from artificial objects and physical disturbance.

> In order for the Butte to hold its sacred powers, it must remain in its natural state as it was in the beginning. The power of the Butte is diminished each time a permanent man-made structure or alteration is made. Eventually, even [our own] sweat lodges must be torn down for this reason.

(Jt.App. p. 40). Roads and buildings create "a distraction and it just pulls our meditation and concentration away from prayer" (Jt.App. pp. 109, 119, 122, 126).

Since 1962 the State of South Dakota has physically altered the Butte to develop it as a public park. Changes include roads, machine shops, wooden walkways, parking lots, campgrounds, and a permanent Visitor's Center. As a natural and intended consequence of State efforts to promote and increase the accessibility of Bear Butte, tourism has swelled to more than 100,000 visits yearly (Jt.App. p. 185). Besides desecrations of the mountain's natural topography, Petitioners suffered the loss of the solitude needed for effective prayer and visions and frequent instances of tourists interrupting ceremonies and removing ceremonial objects (Jt.App. pp. 23, 33, 39-40). Construction, noise and traffic have reached the point that most worshippers can no longer fulfill their religious needs on the Butte (Jt.App. pp. 20-22, 33, 42-43). Only the most powerful medicine men can still find visions there (Jt.App. p. 115).

In April, 1982, Respondents began to require discretionary permits for all users of the Butte, including Lakota and Tsistsistas worshippers, and limited where they could camp and pray (Jt.App. pp. 21, 132-33, 204). This was accompanied by an overnight use fee until Petitioners responded by filing this action (Jt.App. pp. 21, 179, 184, 205). The Butte was completely closed for one month during the 1982 ceremonial season (Jt.App. pp. 60, 178). These restrictions were imposed without consultation or public hearings, and without any form of written regulations or guidelines (Jt App. pp. 129, 132-33, 176-77, 179-80). The terms and conditions of religious use of the Butte continues to be at the discretion of State employees.

An explicit purpose of Respondents' activities has been to expose Petitioners' religious practices to public view so they can learn about "the traditional Indian religious experience" (Jt.App. pp. 136, 151-53, 158, 184, 186). Respondents employ an "interpretive specialist" at the Butte to tell tourists about its "historical and cultural significance and explain to them the spiritual value of the mountain," thus drawing attention to Petitioners' activities (Jt.App. pp. 209-10). Respondents furthermore admit "balancing" Petitioners' privacy and religious freedom with tourists' interests in the day-to-day operation of park facilities (Jt.App. p. 153).

Petitioners strenuously object to the idea that religious freedom can be sacrificed in the name of historical or cultural preservation. It cannot be an appropriate exercise of public authority, consistent with the First Amendment, to make a public zoo out of a people's church—especially where privacy and seclusion are essential to the

consummation of worship. If Petitioners fail here, South Dakota would be free to seize a church or synagogue and operate it for public amusement, on the pretext of public education. There are serious Establishment problems with the use of public funds to renovate and maintain religious facilities under guise of "historical preservation." Both Establishment *and* Free Exercise problems combine when the renovation proceeds over worshippers' protests,* and has the practical effect of abolishing the religion the State purports to be preserving.

PROCEEDINGS BELOW

In their May, 1982, complaint, Petitioners sought a declaration of their right to the full, unrestricted and uninterrupted religious use of Bear Butte, and for injunctive relief from construction projects altering the Butte's natural topography. Petitioners also sought damages under 42 U. S. C. § 1983 for deprivation of their civil rights, particularly for the month they were completely excluded from the Butte, and for restrictions on access and use thereafter. Petitioners were certified as a class, 541 F. Supp. at 787

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* Respondents testified that "numerous people" who "appeared to be American Indian people" but could not be identified further had requested improved road access (Jt. App. pp. 174, 198-99), and that Petitioner Fools Crow told them he was "pleased" with the changes (Jt.App. pp. 211-13), which Fools Crow denied (Jt.App. pp. 45-46). Petitioners' objections for hearsay were overruled (Jt.App. pp. 211-13). Of course it is irrelevant whether Respondents' actions were well-intentioned, the issue being whether they burden the exercise of Petitioners' religion. *Stone v. Graham*, 449 U. S. 39, 41 (1980). Hearsay is a flimsy foundation for the district court's believing, 541 F. Supp. at 789, that there was little or no actual burden.

n. 1, and at a June 18, 1982 hearing on Petitioners' request for a preliminary injunction, the parties stipulated to proceeding in the form of cross-motions for summary judgment, 541 F. Supp. at 788, Jt.App. p. 190.

After reviewing this record, the district court granted Petitioners' preliminary injunction, reserving judgment on "whether or not what the State is doing would have a detrimental effect on the practice of the religion" (Jt.App. pp. 106-7, 188). Seven days later, the district court dissolved the injunction and dismissed Petitioners' action in its entirety, ruling *inter alia* that Respondents "have not burdened" the exercise of religion at Bear Butte by "allowing" tourism, by requiring worshippers to obtain permits for each use, or by restricting where and when worshippers may camp or conduct ceremonies, 541 F. Supp. at 792-93. This was based in part on finding that Respondents' actions were motivated by a desire to aid Petitioners, and the belief that Petitioners approved, 541 F. Supp. at 789-90, 791. It was also based on finding that Respondents had *not in fact* restricted religious access or impaired religious fulfillment, 541 F. Supp. at 791-93, which required believing all of Respondent's testimony and none of Petitioners'.

On appeal, the Eighth Circuit affirmed without discussion, justifying the district court's disbelieving Petitioners' allegations and testimony by treating the June 18, 1982 hearing as a full trial on the merits notwithstanding the parties' stipulations and district court's ruling to the contrary (Appendix 3b).

> **Trial findings, of course, must be affirmed unless clearly erroneous, with the inferences generally drawn**

> in the judgment's favor. On review of a summary judgment on the other hand, the party against whom summary judgment was granted has the benefit of all reasonable evidentiary inferences that can be drawn in his favor.

Toney v. Berglund, 645 F. 2d 1063, 1066 (D. C. Cir. 1981). It is true that "[i]n some circumstances cross-motions for summary judgment *in a federal employee Title VII case* may be treated for purposes of review as a mutual request for trial *on the stipulated administrative record*," 645 F. 2d at 1066 (emphasis supplied), citing *Vetter v. Frosch*, 599 F. 2d 630 (5th Cir. 1979), but this exception only applies to trial *de novo* on appeal from a federal hearing examiner. If the proper standard on appeal is observed here, the decisions below must be reversed as contrary to the evidence.

Neither the district court nor the Court of Appeals specifically addressed whether Respondents' park expansion was sufficiently "compelling" to overcome Petitioners' constitutional right to Free Exercise—nor whether Respondents had chosen the least restrictive alternative for expanding public recreation. This omission is fatal. Petitioners challenged Respondents' purpose in developing the Butte, noting the lack of public necessity or a threat to public safety or order. Petitioners also alleged (and Respondents admitted) that there already are 90,000 acres of State parks, 272,000 acres of national parks, and 2 million acres of multiple-use national forests in South Dakota (Jt.App. pp. 53, 165). As a recreational site, Bear Butte would add only a few hundred acres. Its principal attraction is the opportunity to place Petitioners' religion on public display (Jt.App. pp. 136, 164).

RELATIONSHIP TO OTHER CASES

Bear Butte is located in the Black Hills area jointly reserved by the Lakota and Tsistsistas in the Treaty of September 15, 1851 (11 Stat. 749), and the Treaty of April 29, 1868 (15 Stat. 635). It was never sold or relinquished. Respondents derive their alleged title to the Butte through mesne conveyances from the United States, which confiscated the territory in 1877. Act of February 28, 1877 (19 Stat. 254); *United States v. Sioux Nation*, 448 U.S. 371, 417 (1980). The Indian Claims Commission awarded the "Sioux Nation" the net sum of $102.5 million for the 27 million acre tract, which has not yet been paid, but neither the Oglala Sioux Tribe (one of the seven allied Lakota "Sioux" peoples) nor the Tsistsistas participated in that action. In 1980, the Oglalas filed to quiet title to the Black Hills contending, *inter alia*, that Congress could not constitutionally require them to accept money compensation for the loss of indispensible religious sites. *Oglala Sioux Tribe v. United States*, 650 F. 2d 140 (8th Cir. 1981), *cert den.* 455 U.S. 907 (1982). The Eighth Circuit held that Congress may prescribe an exclusive money remedy for its own unconstitutional actions.

The Indian Claims Commission Act does not preclude tribal land claims against private persons, however. *Oneida Nation v. County of Oneida*, 414 U.S. 661 (1974); *United States v. Dann*, 706 F. 2d 919 (10th Cir. 1983). Dismissal of Oglala claims against private landowners is still pending appeal in the Eighth Circuit. *Oglala Sioux Tribe v. Homestake Mining Co.*, No. 82-2101-SD. The ownership of Bear Butte and other Black Hills lands therefore remains unsettled. Contrary to the district court's assertion

that Petitioners have "no property interest" in the Butte, 541 F. Supp. at 791, Oglala members of the class of persons practicing the Lakota religion retain a live legal claim to the area, and Tsistsistas practitioners have a potential claim not yet asserted through litigation.

REASONS FOR GRANTING THE WRIT

1. The Expansion Of Public Recreation Is Not Sufficiently "Compelling" To Justify Disturbing A Central And Indispensable Place Of Religious Worship.

Our Constitution wisely permits the restriction of religious freedom only if necessary to protect a "compelling" or "overriding" public interest, and even then only by legislation narrowly drawn to minimize the sacrifice of First Amendment rights. *Larson v. Valente*, 456 U.S. 228, 247 (1982); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). Imminent threats to public safety and national defense satisfy the "compelling state interest" test. *Gillette v. United States*, 401 U.S. 437 (1971) (selective service); *Sherrill v. Knight*, 569 F. 2d 124, 130 (D. C. Cir. 1977) (safety of the President); *Brown v. Peyton*, 437 F. 2d 1228, 1231 (4th Cir. 1971) (prison discipline); *Lawson v. Commonwealth*, 164 S. W. 2d 972 (Ky. 1942) (poisonous snakes). Legitimate, but less "paramount" state interests fail. *Sherwood v. Verner*, 374 U.S. 398 (1963) (Sunday closing laws); *In re Jemison*, 375 U.S. 14 (1963) (jury duty); *Frank v. Alaska*, 604 P. 2d 1068 (Alaska 1979) (game conservation); *People v. Woody*, 394 P. 2d 813 (Cal. 1964) (personal use of hallucenogens).

"The 'compelling state interest' standard . . . calls upon the state to show more than a link of reasonable-

ness." *Dunham v. Pulsifer,* 312 F. Supp. 411, 417 (D. Vt. 1970). It calls for "'more exacting scrutiny' than the 'reasonable relation' test provides." *Howe v. Brown,* 319 F. Supp. 862, 864 (D. Ohio 1970). "A state's restriction on the free exercise of religion may not be upheld merely because some rational basis exists therefor; First Amendment rights do not rest on such slender grounds." *Holmes v. Silver Cross Hospital,* 340 F. Supp. 125, 130 (D. Ill. 1972). The limiting adjective, "compelling," limits state intrusions to "only those interests of the highest order and those not otherwise served." *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972). This means that "the state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health or order." *Weaver v. Jago,* 675 F. 2d 116, 118 (6th Cir. 1982). Public necessity must be proved.

Here, however, Respondents did not even *allege* a threat to public health, safety or order. They did not suggest that Petitioners' activities are harmful to themselves or to others.* They merely indicated the desirability of making Bear Butte more accessible to tourists. They offered no reason why additional scenic (and educa-

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* Respondents did contend that *one road* needed repair for safety in bad weather, 541 F. Supp. at 794, but Petitioners dispute this (Jt.App. pp. 109-10) and there was no expert testimony to support Respondents' claims. Even if true, this would affect only a fraction of Petitioners' concerns. Nor do Respondents necessarily have constitutional authority to protect adults from physical harm in violation of religious scruples. *Holmes v. Silver Cross Hospital, supra; In re Osborne,* 294 A. 2d 392 (D. C. App. 1972); *Montgomery v. Board of Retirement,* 109 Cal. Rptr. 181 (1973); involving religious objections to medical treatment where no epidemic disease or threat to other persons was proved.

tional) parkland could not be developed elsewhere, and their suggestion that Bear Butte should be renovated to expose tourists to "the traditional Indian religious experience" stands logic on its head: in order to save it we had to destroy it. The same reasoning would justify the eviction of churches to preserve the buildings as landmarks, or the seizure of the nation's printing presses for display in museums. The rights of free speech, press and religion cannot constitutionally be subverted on the pretext of fossilizing their artifacts for posterity.

2. State Respondents Should Bear The Burden Of Proving That Their Actions Do Not Infringe Impermissibly On Religious Exercise.

It was not for the district court to determine whether Petitioner's objections to Respondents' activities on the Butte were theologically sound. The resolution of theological questions "is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Indiana Employment Security*, 450 U. S. 707, 714 (1981). "It is not within 'the judicial function and judicial competence'" for courts to dispute the "proper interpretation" of matters of religious faith. *United States v. Lee*, 455 U. S. 252, 257 (1982). It is sufficient that Petitioners' beliefs are sincere, and of a religious nature. *Wisconsin v. Yoder*, 406 U. S. 205, 215-19 (1972). Moreover, "in the sensitive area of First Amendment freedoms, the burden is on the state to show that implementation of a regulatory scheme will *not* ultimately infringe upon and entangle it with the affairs of religion,"

not on worshippers to prove that it will. *Surinach v. Pesquera de Busquets,* 604 F. 2d 73, 75-76 (1st Cir. 1979) (emphasis in the original).

Notwithstanding Petitioners' uncontradicted testimony concerning the disruption and diminished effectiveness of ceremonies at Bear Butte, the district court states, 541 F. Supp. at 791, that they "failed to show that the construction projects now in progress, as well as the past developments in the park, have burdened any rights protected by the free exercise clause." This reverses the burden of proof. Petitioners made out a *prima facie* case for the central importance of Bear Butte, the necessity of seclusion and privacy in ceremonies, and the extent to which worshippers had been restricted and disturbed by Respondents and their invitees. Respondents countered merely by asserting their good intentions (Jt.App. pp. 157-59, 169, 177, 183), and that they did not "believe" they were infringing on Petitioners' rights (Jt.App. pp. 162, 186). With all due respect, Respondents' good wishes and beliefs are immaterial. The relevant question is the extent of actual interference with religious practices, *Stone v. Graham,* 449 U.S. 39, 41 (1980), and to this extent Petitioners' statements in the record were uncontradicted.

3. Requiring Worshippers To Obtain Discretionary Permits For The Use Of Bear Butte Was A Per Se Violation Of The Free Exercise Clause.

The district court also found that requiring worshippers to apply for discretionary permits before using the Butte "has not burdened" religious freedom because it does "not require [Petitioners] to violate any tenet of their religion," 541 F. Supp. at 793. This, too, is a mis-

application of established law. A licensing scheme need not violate a specific theological tenet to fail constitutional scrutiny. Unless adequately justified, licensing of religious worship is a *per se* violation of the First Amendment.

> [A]n ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such an official—is an unconstitutional censorship or prior restraint upon the enjoyment of these freedoms.

Shuttlesworth v. City of Birmingham, 394 U. S. 147, 151 (1969), quoting from *Staub v. City of Baxley,* 355 U. S. 321, 322 (1958). Requiring a church to register and file an annual financial disclosure statement is therefore "burdensome and intrusive" in and of itself. *Larson v. Valente,* 456 U. S. at 253 n. 29.

Here, Respondents retain absolute discretion, without any written standards or guidelines, to exclude Petitioners from the Butte, and to impose restrictions on their use of ceremonial sites. We gravely doubt Respondents would be allowed to impose similar restrictions on the use of Christian churches in South Dakota, whether or not Christian theology contains specific objections to the licensing of prayer. Although Respondents have as yet rarely excluded any of Petitioners from the Butte, this is irrelevant. The continued assertion of authority to exclude, without prescribed standards, is repugnant to the First Amendment. Respondents' current informal "pol-

icy" of permitting religious activities on the Butte is no assurance against future abuses.*

4. Devoting Public Funds To The Involuntary Display Of Petitioners' Religious Practices Also Violates The Establishment Clause.

"[A] legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion." *Committee for Public Education & Religious Liberty v. Regan*, 444 U. S. 646, 653 (1980), following *Lemon v. Kurtzman*, 403 U. S. 602, 612-13 (1971). Also see *Harris v. McRae*, 448 U. S. 297, 319 (1980); *Widmar v. Vincent*, 454 U. S. 263, 271 (1981). Public support for, or protection of institutions with religious affiliations is no longer automatically invalid if part of a "facially neutral" policy, *Mueller v. Allen*, 51 L. W. 5050, 5051, 5053-54 (June 29, 1983), nor is "a tolerable acknowledgment of beliefs" by public agencies, provided there is no attempt "to proselytize or advance any one, or to disparage any other, faith or belief," *Marsh v. Chambers*, 51 L. W. 5163, 5165 (July 5, 1983). "The clearest command of the First Amendment is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U. S. at 244.

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* The district court found that *none* of Petitioners ever had been excluded, 541 F. Supp. at 793, ignoring the month-long closure of the Butte in 1982 and at least one worshipper's uncontradicted testimony that she was turned away because she could not afford the overnight camping fee (Jt.App. pp. 21-22).

In the present case, Respondents selectively deprived Petitioners' religion of protection from vandalism and disruptions, for the explicit purpose of selectively exploiting Petitioners' religion for others' educational and recreational enjoyment. A more perverse government entanglement with religion can scarcely be imagined. On the one hand, Petitioners no longer enjoy the same privacy and security as other religious congregations in South Dakota —or, indeed, by all South Dakotans. No other church can be invaded and disrupted with such impunity, or at the State's invitation and expense. On the other hand, no religious congregation in South Dakota is exposed to public view involuntarily and exploited for recreational purposes. Petitioners doubt there would be any question of their right to privacy were they not American Indians practicing traditional American Indian religions. Yet Congress has made it plain that traditional Indian religions are entitled to equal respect under the First Amendment. 42 U. S. C. § 1996. This enactment expressly protects Indians' right of "access to sites" such as Bear Butte.

> Often, these locations include certain sites—a hill, a lake, or a forest glade—which are sacred to Indian religions. Ceremonies are often required to be performed in these spots. To deny access to them is analogous to preventing a non-Indian from entering his church or temple. Many of these sites not in Indian possession are owned by the Federal Government and a few are on State lands.

House Report No. 95-1308 (1978), at 2. Special legislation was deemed necessary because of "the perception of many non-Indian officials that because Indian religious practices are different than their own that they somehow do not have the same status as a 'real' religion." *Ibid.* 4.

Petitioners ask to be free from government-sponsored intrusions. They will happily do without the all-weather roads and running water Respondents apparently feel they should have (Jt.App. pp. 109-10). Respondents' avowed solicitude for Petitioners' religious welfare is both misplaced and unconstitutional, tending only to destroy what it purports to protect. Petitioners simply aspire to privacy, personal security, and freedom from exploitation of their religious practices, not that government "provide the means for carrying them out." *Clark v. Wolff*, 347 F. Supp. 887, 890 (D. Neb. 1972), *aff'd* 468 F. 2d 252 (8th Cir. 1972). This is no more—or less—than other denominations properly expect and receive under the Constitution.

CONCLUSION

For the foregoing reason, Petitioners suggest that a writ of certiorari should be issued to the Court of Appeals for the Eighth Circuit.

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APPENDIX 1A

UNITED STATES DISTRICT COURT
District of South Dakota

June 25, 1982

Chambers of Andrew W. Rogue, Chief Judge
318 Federal Building
Rapid City, South Dakota 57701

Mr. Mario Gonzalez
Attorney at Law
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Mr. Mark V. Meierhenry
Attorney General
State of South Dakota
State Capitol
Pierre, South Dakota 57501

Re: Frank Fools Crow, Arvol Looking Horse, Pete Catches, Grover Horned Antelope, Larry Red Shirt, Selo Black Crow and Francine Nelson, For Themselves and On Behalf of the Lakota Nation and Persons Practicing the Lakota Religion, and Bill Red Hat, Jr., Terry Wilson, Laird Cometsevah, Walter Hamilton, the Southern Cheyenne Research and Human Development Association, Inc., For Themselves and On Behalf of the Tsistsistas Nation and Persons Practicing the Tsistsistas Religion vs. Tony Gullet, In His Official Capacity as Park Manager of Bear Butte State Park; The South Dakota State Game, Fish and Parks; and the State of South Dakota—CIV82-5047

Gentlemen: *MEMORANDUM OPINION*

Bear Butte is a geological formation which stands at the eastern edge of the Black Hills. The Butte has immense cultural and historical importance to this area. Bear Butte was purchased by the State of South Dakota in 1962,

and was designated by the South Dakota Legislature as a State Park. SDCL 41-17-1(1). The Legislature delegated the power to manage and improve state parks for the benefit of the general public to the defendant Department of Game, Fish and Parks. The defendant Tony Gullet is the Department's manager at Bear Butte State Park.

The plaintiffs in this action include traditional chiefs and spiritual leaders of the Lakota Nation and the Tsistsistas Nation.[1] The plaintiffs contend that Bear Butte is the most powerful ceremonial site for the religious practices of the Lakota and Tsistsistas people. In this action the plaintiffs challenge the constitutionality of the defendants' conduct at Bear Butte. Specifically, plaintiffs object to projects, some of which began in April, 1982, by which defendants constructed roads, bridges, parking lots, and other access facilities at Bear Butte. Plaintiffs also object to alleged attempts by defendants to restrict or regulate the access of plaintiffs to Bear Butte for worship and ceremonial purposes.

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[1]Plaintiffs requested this Court to certify this proceeding as a class action. The class to be represented would be the Lakota Nation, persons practicing the Lakota religion, the Tsistsistas Nation, and persons practicing the Tsistsistas religion. It appears that class actions seeking protection of constitutional rights are particularly appropriate under Rule 23(b)(2). This Court further finds: (1) that an adjudication with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members not parties to the adjudication; and (2) that defendants have acted on grounds generally applicable to the class. *See Petersen v. Talisman Sugar Corp.*, 478 F. 2d 73 (5th Cir. 1973); Wright and Miller, *Federal Practice and Procedure, Civil* §§ 1775-76. Therefore, final injunctive or declaratory relief is appropriate with respect to the class as a whole. Accordingly, this Court has certified this action as a class action pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure.

Accordingly, plaintiffs brought this action for declaratory and injunctive relief, and for damages. They contend that defendants' actions both restricting and regulating access to the Butte for religious purposes violates the Free Exercise Clause of the first amendment, the American Indian Religious Freedom Act, 42 U. S. C. § 1996, Article 18 of the Universal Declaration of Human Rights, and Article 18 of the International Covenant on Civil and Political Rights. Plaintiffs assert that these provisions also establish the right of the Lakota and Tsistsistas people to the "continued natural topographic unity and isolation of Bear Butte. . . ." On this basis plaintiffs oppose the constructive projects.

Plaintiffs request this Court to declare plaintiffs' right to full, unrestricted and uninterrupted religious use of the Butte. Additionally, plaintiffs seek an injunction precluding defendants from restricting or regulating plaintiffs' access to and use of Bear Butte for religious purposes. Plaintiffs seek an injunction not only to enjoin construction projects or any other alteration of the natural features of the Butte, but they also request this Court to order defendants to remove any roads, parking lots and buildings currently in place at the park. Finally, plaintiffs seek over one million dollars in damages for the alleged deprivation of their civil rights. 42 U. S. C. § 1983. This Court has jurisdiction of the controversy pursuant to 28 U. S. C. §§ 1331, 1343(3) and (4).

On June 18, 1982, this Court heard the evidence on a motion for a preliminary injunction. After the hearing, the parties agreed that the evidentiary hearing on the motion could be consolidated with the trial on the merits.

The merits of this case are before this Court on the parties' cross-motions for summary judgment.

The plaintiffs presented several witnesses in addition to numerous affidavits. Plaintiffs' witnesses included two Lakota medicine men. They stated that Bear Butte was the site where the Lakota originally met with the Great Spirit. It was the place of instruction and remains today the most significant site of Lakota religious ceremonies. To the Tsistsistas, Bear Butte likewise is the site of pilgrimages where worshipers go to receive the powers and benefits of the Great Spirit. Additionally, Lakota worshipers conduct the Vision Quest at Bear Butte. The Quest is one of the seven sacred ceremonies of the Lakota people. During the Quest, the vision seeker and all his family and companions must be purified by means of the "sweat lodge" ceremony. The worshipers fast during this time. The vision seeker climbs to a solitary place on the Butte where he prays aloud and sings. The vision seeker may leave sacred gifts on the Butte for the Great Spirit. During the Vision Quest, which may last up to four days, the companions wait below the Butte, and sing honorary songs and pray.

In this action, plaintiffs contend that the conduct of the defendants and the general public at Bear Butte destroys the sanctity and power of the religious ceremonies and violates their right to exercise freely their religious beliefs. Specifically, defendants have allegedly desecrated the ceremonial area at the foot of the Butte through the construction of access roads and parking lots. Defendants also constructed wooden viewing platforms on the Butte. It is also alleged that defendants disrupt ceremon-

ies and interfere with the worshipers by permitting tourists to camp at the Butte and hike to the top of the mountain. Plaintiffs' witnesses stated that tourists violate the sanctity of the ceremonies by taking photographs, carrying food and water on the Butte, taking the worshiper's offerings from the Butte, and bothering prayers and singers. Plaintiffs alleged that defendants violate their constitutional rights by *allowing* tourists to behave as set forth above. Finally, plaintiffs allege that defendants denied the worshipers access to roots and plants necessary for Vision Quest ceremonies at the Butte.

The defendants agreed that Bear Butte is a traditional, significant religious site for the Lakota and Tsistsistas people. In fact, defendants maintain the park, in part, to serve and assist Indian worshipers. The State also manages Bear Butte State Park for the benefit of the general public. The park has educational facilities through which the public can discover the importance of the Butte to the original development of the Black Hills, as well as the geological and Indian religious values of the Butte.

This most recent dispute apparently arose when the defendants began several construction projects at the park. *See,* Exhibit 3. Most important of these projects was an access road and parking lot adjacent to the area southeast of the Butte traditionally used by Indians as a ceremonial ground and campsite. The State maintains this campsite for the exclusive use of ceremonial campers. The general public is not authorized to drive to or camp in this area. Defendants found, however, that the vehicles of the ceremonial campers became mired in the mud near the camp-

site; the makeshift road also provided poor access to the campsite. As a result of vehicle traffic through the open fields, vegetation was destroyed and erosion occurred. For this reason defendants sought and received authorization to build the road and parking lot at the ceremonial grounds. Although plaintiffs' witnesses abhored the desecration represented by the construction, defendants contend many worshipers in the past urged the State to provide better and safer access to the site. The parking lot does not occupy the area utilized for ceremonies. It would occupy the same area used by worshipers to park their automobiles in the past. At this ceremonial area the defendants also provide services such as outdoor bathroom facilities, garbage disposal, and free firewood. The plaintiffs apparently do not object to these activities of the defendants.

Tony Gullet also testified that worshiper/campers may now obtain a ten-day camping permit. Defendants enforce a five-day stay limit at the non-religious campsites at Bear Butte State Park. There was no testimony that any Lakota or Tsistsistas ceremony lasted beyond ten days. Additionally, Gullet testified that park employees are instructed to urge tourists and hikers not to interfere with the Indian worshipers at the Butte. Although plaintiffs object to the construction of platforms on the Butte, Gullet testified that the platforms were built as a means of minimizing the contacts of tourists with worshipers. Tourists are told by defendants not to stray from established hiking trails or from the viewing platforms. Violators are arrested and issued citations. Gullet testified that there are places on the Butte to which worshipers may go out of the sight of the general public. Although worshipers may still

hear other hikers and campers, Gullet testified that many of the sources of noise at the Butte are outside defendants' control. Gullet also testified that defendants permit hiking on the Butte by the general public only between the hours of eight o'clock, A. M., to eight o'clock P. M. Indian religious campers are free to stay on the Butte overnight and may freely hike and camp without regard to the time regulation.

Other construction at the park includes relocating a shop building, constructing a new access road to the shop's new location, and the repairing and resurfacing of the main road into the park. SDCL 41-2-24 and 41-17-4 provide general authority to the Department to construct these improvements in the park. Defendants contend that the construction projects were necessary to improve both the recreational use of the park by the general public and the traditional religious use by Native Americans.

The record does not disclose a single instance in which defendants denied any plaintiff access to Bear Butte for the purpose of conducting ceremonies or worship. Defendants enforced a single restriction during the period of construction on the road and parking lot at the traditional ceremonial ground: during this time period defendants permitted no camping overnight at the ceremonial ground. Daytime use of the ceremonial ground was permitted and camping overnight was restricted to a campsite in the park at Bear Butte Lake. Although defendants initially may have attempted to charge the usual camping fee for use of the lake campsite, Gullet testified that the fee requirement was waived and Native American campers were permitted to stay at the Lake free of charge during the construction period.

Defendants' witnesses testified that it is the policy of the Department to accommodate and not to infringe upon the traditional Indian uses of Bear Butte. Defendants assert that they have never in the past, nor will they in the future, deny Indian worshipers access to the Butte. Instead, defendants contend that they have sought to minimize the conflict of competing recreational and religious uses of the Butte through the creation of distinct "activity sites."

Although plaintiffs object to the requirement of registration upon entry to the park, defendants contend that registration provides essential control over traffic. The registration list shows when persons enter and leave the park. In the case of an emergency, if a visitor must be reached, defendants can quickly determine if the visitor is still in the park. Plaintiffs also object to the requirement of camping permits.

I.

The first amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." In *Cantwell v. Connecticut*, 310 U. S. 296, 60 S. Ct. 900 (1940), the Supreme Court held that the free exercise clause was applicable to the states through the fourteenth amendment. The free exercise clause proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. *Braunfeld v. Brown*, 366 U. S. 599, 81 S. Ct. 1144 (1961). In this case, there is no dispute that plaintiffs' practices at Bear Butte are based upon a system of belief that is religious and is

sincerely held by plaintiffs. *Wisconsin v. Yoder,* 406 U. S. 205, 215-16, 92 S. Ct. 1526 (1972). This Court, therefore, must determine whether the conduct of defendants violates the right of plaintiffs to the free exercise of their religion.

The Supreme Court utilizes a two-part balancing test for determining whether a particular governmental action unduly burdens an individual's free exercise of religion. First, a court must decide whether the conduct, regulation, or law at issue burdens the free exercise of religion. Second, the restriction on the free exercise of religion must be balanced against the importance of the state's interest in the regulation or restriction. *See, Sherbert v. Verner,* 374 U. S. 398, 83 S. Ct. 1790 (1963); *Thomas v. Review Board of the Indiana Employment Security Division,* 435 U. S. 618, 101 S. Ct. 1425 (1981). Even if the state's interest weighs heavier in this balance the regulation or restriction will be invalid if the state's interest can be achieved by less restrictive alternative means. *Id.*

On the plaintiffs' side, "it is necessary in a free exercise case to show the coercive effect of the [restriction] as it operates against the practice of their religion." *School Dist. of Abington v. Schempp,* 374 U. S. 203, 223, 83 S. Ct. 1560 (1963). In the past, courts found this "coercive effect" when government dictates compelled citizens to violate the tenets of their religion; *see, Wisconsin v. Yoder,* 406 U. S. 205 (1972), or when government action made receipt of a public benefit or right conditional upon renunciation of a religious practice. *See, Sherbert v. Verner,* 374 U. S. 398 (1963). Thus, plaintiffs must establish that they are being injured or penalized by their ad-

herence to the tenets of their religion, or that their conduct in the course of exercising their beliefs has been unduly restricted. *Life Science Church v. Internal Revenue Service*, 525 F. Supp. 399 (N. D. Cay. 1981).

In this case plaintiffs contend that the free exercise of their religion has been burdened by the conduct of defendants in several respects: (1) defendants diminish the spiritual value of the Butte by constructing roads, parking lots, buildings, and platforms on or near the Butte; (2) defendants restricted plaintiffs' use of the traditional ceremonial area during the period of construction; (3) defendants allow tourists at Bear Butte to disrupt religious practices in numerous ways; and (4) defendants restricted the religious practices of plaintiffs at Bear Butte Lake, where they were required to camp during the period of construction.

CONSTRUCTION

The nature and purposes of the construction in progress in the park were previously set forth in this opinion. Plaintiffs contend that the alteration of the natural features of Bear Butte constitutes a violation of their religious beliefs. The construction diminishes the power of the Butte as a ceremonial ground.

It is clear to this Court that plaintiffs have no property interest in Bear Butte or in the State Park. For many years the State has administered this area as a state park. During this time it appears that plaintiffs' religious practices managed to coexist with the diverse developments that occurred there. Over this period the defendants carried out various building and construction projects at the

park, pursuant to the authority given them by SDCL 41-17-4. Most recently, defendants began constructing an access road and parking lot at the traditional ceremonial ground. Although the named plaintiffs object to the construction, defendant Gullet testified that over the past three years numerous Indian religious campers requested that the State provide safer and better access to the ceremonial grounds. Although plaintiffs object to the platforms on the Butte, Gullet testified that the Department erected the platforms as a means of restricting tourist traffic on the Butte and to provide greater privacy to vision seekers and fasters elsewhere on the Butte.

In *Hopi Indian Tribe v. Block,* 8 ILR 3073 (No. 81-0481, D. O. C., June 15, 1981), the Hopi Tribe sought to enjoin development of the Arizona Snow Bowl, a recreational facility in the San Francisco Peaks and the Coconino National Forest. The Hopi Tribe also claimed that the free exercise of their religion required that the mountains remain free of manmade disturbances. The response of the court in *Hopi Indian Tribe* is significant:

> [Plaintiffs] are essentially claiming that anyone asserting a religious interest in government property . . . has a constitutional right to demand that the government grant them access to it, yet restrict the rights of the public to, and any development of, this property in order to facilitate the exercise of religious beliefs. This Court will not extend the First Amendment to such limits. Not only is there an insufficient showing of a burden on plaintiff's Free Exercise rights, but such a result would clearly fly in the face of the principles of the Establishment Clause of the First Amendment. *Id.,* at 3075.

This Court likewise concludes that plaintiffs failed to show that the construction projects now in progress, as well as

the past development in the park, have burdened any rights protected by the free exercise clause. Plaintiffs failed to establish that particular religious practices were damaged by the construction, or that the free exercise clause obligated defendants to waive their statutory power to manage and develop the state park in the public interest. Instead, we conclude that the free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out. *Clark v. Wolff*, 347 F. Supp. 887 (D. Neb. 1972), *aff'd*, 468 F. 2d 252 (8th Cir. 1972).

TOURISTS

This Court also rejects plaintiffs' claim that the free exercise clause obligates defendants to control the actions of the general public at the Butte which may interfere with plaintiffs' religious practices. Specifically, plaintiffs contend that defendants should not permit tourists to photograph vision seekers, ceremonies, or religious objects; bring water and food on the Butte during a vision quest; operate car horns, motorcycles, radios, etc., during a vision quest; take religious offerings off the Butte; permit non-Indian women having their menstrual period to go on the Butte during a vision quest. The first amendment does not require defendants to police the actions of tourists, even though defendants voluntarily urge tourists to respect the religious practices of plaintiffs at the Butte. In *Badoni v. Higginson*, 638 F. 2d 172, 179 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 3099 (1981), the court rejected a similar claim. The court stated:

> The First Amendment protects one against action by the government, though even then, not in all cir-

> cumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life. [Cites omitted.] Were it otherwise, the Monument would become a government-managed religious shrine.

In this context, it is significant that plaintiff Grover Horned Antelope testified that he successfully completed his Vision Quest last year, in spite of distractions by tourists. This Court concludes, therefore, that defendants have not burdened the exercise of plaintiffs' religion by "allowing" tourists to act on occasion in a manner which does not conform to the dictates of plaintiffs' religion.

CEREMONIAL AREA

During the period of construction on the access road and parking lot, defendants closed *for overnight camping* the area traditionally used by plaintiffs for religious ceremonies. Defendant Gullet testified that the Department originally contemplated closing the area for all uses. See, Exhibit 1. Defendants have permitted daytime use of the area, however, and worshipers continue to use the area for sweat lodge ceremonies and fasting. Although plaintiffs have concluded that their right of access was unduly restricted, the record fails to show that a single person was ever denied access to Bear Butte for religious purposes. Defendants closed the ceremonial area temporarily and partially, in the interests of protecting the safety of the public and assuming the most expedient completion of construction. Obviously, work on the access road and parking lot would be frustrated if the vehicles

of park visitors were allowed to interfere with heavy construction machinery. The greater delay in construction only increases the danger of erosion and washouts—the same dangers which suggested the need for permanent roads in the first place.

In both *Badoni v. Higginson* and *Sequoyah v. Tennessee Valley Authority*, 620 P. 2d 1159 (6th Cir. 1980), the courts held that Native Americans' right to free exercise of religion was not unduly burdened even though their access to sacred ceremonial sites was completely barred by the permanent flooding of the sites for dam and reservoir projects. In the present case, any right of access possessed by plaintiffs is restricted only partially and temporarily. Plaintiffs failed to establish that overnight camping at the ceremonial area is an indispensible part of their religious practices. Conversely, defendants met their burden of demonstrating that the State has a compelling interest in completing the construction projects, both for environmental and administrative reasons. Excluding the public and religious users from the ceremonial area, for a limited time, is the least restrictive means of completing the project expeditiously and with minimum danger to the public and the environment. Accordingly, this Court has utilized the two-part balancing test, and concludes that the free exercise rights of plaintiffs were not infringed upon by the restrictions placed upon access to the ceremonial area.

BEAR BUTTE LAKE

During the period of construction, plaintiffs were required to camp overnight at the campsite at Bear Butte

Lake. Park regulations precluded plaintiffs from building sweat lodges at the Lake campground. But Gullet testified that during this same period plaintiffs could build their sweat lodges at the traditional ceremonial area. It is clear that defendants did not discriminate against plaintiffs *because* of their religion. The prohibition against sweat lodges at the Lake was based upon a camping regulation generally applicable to all visitors to the park. Additionally, plaintiffs were only minimally restricted with respect to the time and place of conducting the sweat lodge ceremony. Admittedly, the Free Exercise Clause is an absolute prohibition on any infringement of the freedom to believe. However, conduct undertaken because of religious beliefs is not absolutely protected, and may be regulated or prohibited by government if there is an important or compelling state interest. *Bridges v. Davis*, 443 F. 2d 970 (9th Cir. 1971), *cert. denied*, 405 U. S. 919 (1971). With respect to ceremonial restrictions at Bear Butte Lake, this Court holds plaintiffs failed to establish that defendants impermissibly burdened the practice of their religion.

Finally, this Court further concludes that plaintiffs' right of free exercise of religion is not infringed when they are required to register at the park Visitor Center and acquire camping permits. The courts hold permit requirements unconstitutional only when they have been used to restrain first amendment rights without narrow, objective standards. *Shuttlesworth v. Birmingham*, 394 U. S. 147, 89 S. Ct. 935 (1969); *Padoni v. Higginson*, 638 F. 2d at 180. Plaintiffs did not allege that the permit requirement restricted plaintiffs' access to the Butte or to ceremonial sites. Nor did they allege that any such per-

mit was requested and denied. Plaintiffs simply object to the requirement of permits and registration at a place so deeply rooted in their religious tradition. By requiring permits and registration, however, defendants have not burdened plaintiffs' religious exercises in the area of Bear Butte. The requirements do not require plaintiffs to violate any tenet of their religion, but serve valid state interests in controlling traffic at the park and in providing the means to contact visitors in case of an emergency.

II.

Plaintiffs also brought this equitable action under the American Indian Religious Freedom Act, 42 U. S. C. § 1996, Article 18 of the Universal Declaration of Human Rights, and the Article 18 of the International Covenant on Civil and Political Rights. Plaintiffs seek substantial damages for violation of their civil rights. 42 U. S. C. § 1983. The American Indian Religious Freedom Act provides, *inter alia*, that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe . . . and exercise [their] traditional religions, including, but not limited to access to sites, use and possession of sacred objects, and the freedom to worship. . . ." In *Hopi Indian Tribe v. Block*, 8 IRL at 3076, the court correctly analyzed the legislative history and purpose of the Act.

First, it is not clear that the Act governs the conduct of state governments or agencies. It applies expressly only to the federal government. Second, the Act does not create a cause of action in federal courts for violation of rights of religious freedom. The Act is merely a state-

ment of the policy of the federal government with respect to traditional Indian religious practices.

> The Act was meant to insure that American Indians were given the protection that they are guaranteed under the First Amendment; it was not meant to in any way grant them rights in excess of those guarantees. . . . The Act does not require that access to all publicly owned properties be provided to the Indians without consideration for other uses or activities, nor does it require that native traditional religious considerations always prevail to the exclusion of all else. *Id.; see also,* H. REP. 1308, 95th Cong., 2nd Sess. (1978).

This Court has concluded that with respect to the free exercise rights of plaintiffs, the conduct of defendants complied with the dictates of the first amendment. The American Indian Religious Freedom Act requires no more. This Court likewise fails to find any authority that indicates a legally cognizable right or cause of action is created by either Article 18 of the Universal Declaration of Human Rights or Article 18 of the International Covenant on Civil and Political Rights. Plaintiffs cited no authority to support the claim that these enactments or declarations create legal rights in addition to those recognized by the first amendment. Accordingly, this Court concludes that plaintiffs' claims under the Declaration and the Covenant are equally without merit.

In summary, this Court concludes that plaintiffs failed to establish any infringement of a constitutionally cognizable first amendment right. To the extent their right of access was temporarily restricted at the ceremonial grounds, this Court concludes that the plaintiffs' interests are outweighed by compelling state interests in preserving

the environment and the resource from further decay and erosion, in protecting the health, safety, and welfare of park visitors, and in improving public access to this unique geological and historical landmark.

It is worth noting, finally, that some courts have expressed great concern that special treatment such as that afforded religious users of the park may constitute a violation of the Establishment Clause. At Bear Butte State Park, religious campers have a special camping area, from which the general public is excluded. Religious campers may acquire a permit to stay in the park up to ten days. The general public is limited to five days. Religious campers were permitted to camp free of charge at Bear Butte Lake. The general public must pay a fee to camp there. At the Butte itself, the Department has limited public access to established trails and platforms. Indian religious users may freely roam the Butte. Finally, the general public can hike the Butte only during a twelve-hour period of the day. Religious campers can stay on the Butte without regard to these time restrictions. Thus, defendants have gone far to afford special treatment and special privileges to American Indian religious practices at the Butte. Defendants justify their policies because the Indian religious tradition helps define the value and importance of Bear Butte to this region. In so doing, however, the government risks being hailed into court by others who claim that the same rights of the general public are being unduly burdened, or that state government has become "excessively entangled" with religion, in violation of the Establishment Clause. *See, e.g., Widmar v. Vincent,* 102 S. Ct. 269, — U. S. — (1981).

For the foregoing reasons, this Court grants defendants' motion for summary judgment on all claims stated in plaintiffs' Complaint. Plaintiffs' prayer for declaratory and injunctive relief is denied. Having failed to establish a deprivation of their constitutional rights, plaintiffs' claim for damages under 42 U. S. C. § 1983 is also denied. This Court will issue an order lifting the injunction previously entered with respect to construction at the ceremonial grounds.

The foregoing constitutes this Court's findings of fact and conclusions of law.

BY THE COURT:

/s/ Andrew W. Bogue, Chief Judge
United States District Court

APPENDIX 1B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1852

Frank Fools Crow, Arvol Looking Horse, Pete Catches, Grover Horned Antelope, Larry Red Shirt, Selo Black Crow, and Francine Nelson, for Themselves and on behalf of the Lakota Nation and Persons Practicing the Lakota Religion, and Bill Red Hat, Jr., Terry Wilson, Laird Cometsevah, Walter Hamilton, The Southern Cheyenne Research and Human Development Association, Inc., for Themselves and on behalf of the Tsistsistas Nation and Persons Practicing the Tsistsistas Religion,

Appellants,

vs.

Tony Gullet, in his Official Capacity as Park Manager of Bear Butte State Park, The South Dakota State Game, Fish and Parks, and The State of South Dakota,

Appellees.

Appeal from the United States District Court
for the District of South Dakota

Submitted: February 17, 1983
Filed: May 10, 1983

Before LAY, Chief Judge, BRIGHT and ROSS, Circuit Judges.

PER CURIAM.

Plaintiffs-appellants, spiritual leaders and religious practioners of the Lakota and Tsistsistas Nations, brought a class action suit against defendants-appellees, the Manager of the Bear Butte State Park, the South Dakota Fish and Parks Department, and the State of South Dakota. Appellants sought declaratory and injunctive relief, as well as damages under 42 U. S. C. § 1983 (1976) on the grounds the appellees' actions in developing and regulating public use of Bear Butte State Park violated appellants' religious free exercise rights under the first amendment,[1] the American Indian Religious Freedoms Act (42 U. S. C. § 1996 (Supp. 1979)), Article 18 of the Universal Declaration of Human Rights, and Article 18 of the International Covenant on Civil and Political Rights. District court jurisdiction was based on 28 U. S. C. §§ 1331, 1343 (3) & (4) (1976).

Bear Butte, a geological formation on the eastern edge of the Black Hills in South Dakota, was acquired by the state in 1962 and designated as a state park. The Butte is an important religious site for the Lakotas and Tsistsistas, and has been traditionally used by these people for various religious ceremonies, including the Lakotas' Vision Quest, a ceremony which may last for several days. In recent years the state has developed the park by constructing roads, a machine shop, campgrounds, parking lots, wooden walkways on the Butte, and a visitor's center. Most recently, the state has undertaken several construction projects including constructing an access road to and

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[1]U. S. CONST. amend. I.

a parking lot near the area of the Butte traditionally used by the Indians as a ceremonial ground and campsite, relocating the maintenance shop, and repairing and resurfacing the main road into the park. In addition, the state requires that all persons entering the park register at the visitor's center and that all persons wishing to camp at the park obtain a camping permit. The permit for ceremonial campers is free of charge and allows a ten day stay.

Appellants essentially maintain that the state's development, construction, and regulatory activities violate their constitutional and statutory religious rights in that (1) the development, construction, and resulting increase in tourist presence at the park have diminished the spiritual value of the Butte and have impaired religious ceremonies; (2) appellants' access to the traditional ceremonial grounds and their religious activities at other campsites were restricted during the state's construction activities; (3) registration and camping permit requirements impermissibly burden appellants' religions; (4) appellants have failed to control tourists disrupting appellants' religious practices at the Butte.

On June 18, 1982, pursuant to the agreement of the parties, trial on the merits was consolidated with the evidentiary hearing held on appellants' motion for a preliminary injunction, and the district court[2] considered the merits of the dispute on the parties' cross-motions for summary judgment.[3] The district court generally found

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[2]The Honorable Andrew W. Bogue, Chief Judge, United States District Court for the District of South Dakota.

[3]*See Fools Crow v. Gullet*, 541 F. Supp. 785, 788 (D. S. D. 1982). Although the district court indicated that the merits

(Continued on following page)

that the plaintiffs had not shown that the defendants' development, construction and regulatory actions burdened plaintiffs' religious exercises in the Bear Butte area, and stated in summary that:

> plaintiffs failed to establish any infringement of a constitutionally cognizable first amendment right. To the extent their right of access was temporarily restricted at the ceremonial grounds, this Court concludes that the plaintiffs' interests are outweighed by compelling state interests in preserving the environment and the resource from further decay and erosion, in protecting the health, safety, and welfare of park visitors, and in improving public access to this unique geological and historical landmark.

Fools Crow v. Gullet, 541 F. Supp. 785, 794 (D. S. D. 1982).[4]

(Continued from previous page)

were before the court on the parties' cross-motions for summary judgment, it is clear from the record and opinion in this case that in fact the court was entering a judgment for defendants after a stipulated trial on the merits. Thus, for purposes of appellate review the standard is that applicable to such judgments (i. e., the clearly erroneous doctrine), rather than the stringent standard of review applicable to summary judgment (viewing evidence in light most favorable to nonmoving party to determine if there is genuine issue of material fact). *Cf. Toney v. Bergland*, 645 F. 2d 1063, 1066 (D. C. Cir. 1981) (for purposes of appellate review, in some circumstances cross-motions for summary judgment may be treated as a mutual request for trial on a stipulated record).

[4]*See Badoni v. Higginson*, 638 F. 2d 172, 176-80 (10th Cir. 1980) (denied relief to members of the Navajo tribe challenging, on first amendment free exercise grounds, the governmental regulatory and development activities at the Rainbow Bridge National Monument and Glen Canyon Dam), *cert. denied*, 452 U. S. 954 (1981); *Sequoyah v. TVA*, 620 F. 2d 1159, 1164-65 (6th Cir.) (rejected free exercise challenge by Cherokee Indians to the flooding of ceremonial grounds caused by the Tellico Dam), *cert. denied*, 449 U. S. 953 (1980); *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 552 F. Supp. 951,

(Continued on following page)

The district court also concluded that even assuming that the American Indian Religious Freedom Act (42 U. S. C. § 1996), Article 18 of the Universal Declaration of Human Rights, and Article 18 of the International Covenant on Civil and Political Rights applied to the state in this case, these provisions did not establish any legal rights or causes of action beyond those recognized under the first amendment. *See Fools Crow v. Gullet, supra,* 541 F. Supp. at 793-94. *See also Hopi Indian Tribe v. Block,* 8 I. L. R. 3073, 3076 (D. D. C. 1981).

Accordingly, the district court granted defendants' motion for summary judgment as to all claims raised in plaintiffs' complaint. Before this court, appellants have essentially raised the same contentions made in the district court. We have carefully considered appellants' arguments, the record, and the district court opinion, and conclude that the court was neither clearly erroneous as to its factual determinations nor mistaken as to the law it was applied to the facts. Accordingly, we affirm on the basis of the district court's opinion. *See* 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Continued from previous page)

954 (N. D. Cal. 1982) (road construction and accompanying intrusions into area sacred to several Indian tribes did not unlawfully burden Indian plaintiffs' free exercise rights). *See also Inupiat Community of Arctic Slope v. United States,* 548 F. Supp. 182, 186-87 (D. Alaska 1982); *Hopi Indian Tribe v. Block,* 81 I. L. R. 3073 (D. D. C. 1981).

APPENDIX 1C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1852-SD September Term, 1982

FRANK FOOLS CROW, ET AL.,

Appellants,

vs.

TONY GULLET, in his official capacity as Park Manager of Bear Butte State Park, et al.,

Appellees.

Appeal from the United States District Court
for the District of South Dakota

JUDGMENT

(Filed July 5, 1983)

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties, and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed on the basis of the District Court's opinion. See Eighth Circuit Rule 14.

Costs taxed in favor of Appellees: May 10, 1983

Costs of briefs for recovery from Appellants: $18.50

A True Copy:

ATTEST:

Clerk, U. S. Court of Appeals, Eighth Circuit 6/29/83

APPENDIX 1D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

82-1852-SD September Term 1982

FRANK FOOLS CROW, ET AL.,

Appellants,

vs.

TONY GULLET, ETC., ET AL.,

Appellees.

Appeal from the United States District Court
for the District of South Dakota

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

June 14, 1983

Office-Supreme Court, U.S.
FILED
OCT 15 1983
ALEXANDER L. STEVAS,
CLERK

NO. 83-434

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

FRANK FOOLS CROW, ETC., ET AL.,
Petitioners,

v.

TONY GULLET, ETC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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NO. 83-434

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On or about the 20th of May, 1982, the Petitioners brought this action for declaratory and injunctive relief, and for damages

contending that the State of South Dakota in operating and developing Bear Butte State Park had violated the Free Exercise of Religion Clause of the First Amendment of the United States Constitution.

The Petitioners requested the Federal District Court to declare Petitioners' rights to full, unrestricted and uninterrupted religious use of Bear Butte State Park. Additionally, Petitioners sought an injunction precluding the State from restricting or regulating their access to and use of Bear Butte State Park. Furthermore, Petitioners sought an injunction, not only to stop any new construction projects on the Butte, but also to direct the State to remove all present roads, parking lots, and buildings currently in place at the park. Finally, the Petitioners request over one million dollars in damages for alleged deprivation of their

civil rights under 42 U.S.C. § 1983. JA 10-11.[1]

Bear Butte is a geological laccolith which stands in striking solitude on the plains of South Dakota near the northeast edge of the Black Hills.[2] The Butte has immense cultural, historical, and geological importance to all people; both Indian and non-Indian. Bear Butte was purchased by the State of South Dakota in 1962, and subsequently designated and established as a State Park in perpetuity by the South Dakota Legislature. JA 150. As Lowen Schuett, Director of the Division of Parks and Recreation for

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1 JA refers to the Joint Appendix of the parties on appeal to the Eighth Circuit, which includes the pleadings and transcript of the June 18, 1982, hearing in Federal District Court on Plaintiffs (Petitioners here) request for a Preliminary Injunction.

2 Bear Butte is a similar geological formation to Devil's Tower in Wyoming, but time has not yet eroded all of the soil around Bear Butte.

the State of South Dakota established at the Federal Evidentiary Hearing, "State Parks are for the purpose of preserving and protecting unique and natural historic, geologic features of the State, and also providing opportunities for the public to participate in recreational activities." JA 151. He continued by testifying that, "The purpose of Bear Butte State Park is to preserve the unique, historical and geological aspect of the Butte, plus provide the public an opportunity to learn about the historical and cultural features which are associated with the Butte, and perhaps a third objective of giving the public an opportunity to hike trails and participate in some limited picnicking opportunities." JA 151-152.

After purchasing the property in 1962, the State of South Dakota in 1967, constructed, adjacent to the south slope, a Visitor's Center along with a main access

road to that Visitor's Center. JA 161. In addition the State has constructed a parking lot which serves the Visitor's Center; another parking lot that serves a trail head contact station; a residence for the park manager and park shop located a little south of the Visitor's Center. JA 171.

Apparently, this present action was brought by the Petitioners when the State started several new construction projects at the Butte. In 1982, the State of South Dakota determined that several improvements were necessary to better facilitate the use of Bear Butte State Park. To accomplish this the State entered into several construction contracts to:

1. Move the park shop from its present location down further south of the Visitor's Center so that it would not disrupt the scenic view of Bear Butte from the Visitor's Center;

2. Build a new access road to the park shop's new location;

3. Build an access road and parking lot for the ceremonial worshipers adjacent to the area they have historically used to conduct their religious practices; and

4. Repair and blacktop the existing main road into Bear Butte State Park.

The most controversial construction project was the access road and parking lot adjacent to the ceremonial use area. The gravel spur road constructed by the State replaces a dirt trail used by the Petitioners to get down to the area where they have traditionally camped with their cars and vans. The new road gives the Petitioners all-weather access into the traditionally ceremonial use area and prevents the Petitioners' vehicles from tearing up the meadow when it rains. JA 135, 158, 161, 174. Furthermore, the parking lot occupies the exact same area used by past ceremonial worshipers to park their automobiles and does

not occupy any of the area utilized for the ceremonial religious activity itself. JA 46, 135. Finally, many of the ceremonial users themselves requested an all-weather access into the area prior to the State's construction. JA 174, 198.

ARGUMENTS

I

THE PETITIONERS FAILED TO ESTABLISH ANY INFRINGEMENT OF A CONSTITUTIONALLY COGNIZABLE FIRST AMENDMENT RIGHT.

Whether or not the State of South Dakota has infringed on the Petitioners constitutional right of free exercise of religion is a factual question. Both the Federal District Court of the Western Division of South Dakota, and the Eighth Circuit Court of Appeals have found that the State's activities at Bear Butte State Park have not interferred or infringed upon the Petitioners religious freedom. It is a well established

rule that this Court does not grant certiorari to review evidence and discuss specific facts, (United States v. Johnson, 268 U.S. 220, 227 (1925)), and has often held that "a court of law, such as this Court is, rather than a court for correction of errors in fact findings, cannot undertake to review concurrent findings of facts by two courts below in the absence of a very obvious and exceptional showing of error." Graver Tank and Mfg. Co. v. Linde Air Products Co., 337 U.S. 910 (1949). Such error does not exist in this case.

The State of South Dakota has not managed Bear Butte to disrupt or to exhibit the Petitioners religious activities at the Butte; but has managed the Butte for the benefit of all of the citizens of the State of South Dakota, and has made a conscious attempt to balance, Petitioners privacy and

religious freedom, with the other legitimate and important uses of Bear Butte State Park. JA 153.

II

DOES FREE REGISTRATION RESTRICT THE PETITIONERS CONSTITUTIONAL RIGHT OF FREE EXERCISE OF RELIGION.

The State of South Dakota requires Petitioners to register and receive a permit before they are allowed to camp overnight in the religious ceremonial use area. Petitioners erroneously believe that this registration scheme requires them to receive a permit each and every time they go upon the Butte to pray, and they feel that this registration and permitting process is a violation of their religious freedom. The Petitioners fail to realize that their registration and permit is not imposed on the Petitioners to enter Bear Butte, and conduct their religious activities, but the registration and permit is required for overnight camping.

The free registration and permit process serves two purposes for the State of South Dakota:

> (1) It provides park personnel with a means to contact ceremonial worshipers in the case of an emergency (JA 126) and;
>
> (2) The traditional ceremonial use area is closed to the general public for recreational camping. Overnight camping in the traditional use area is only allowed as it is necessary for those individuals and their supporters to conduct their ceremonial religious practices. By requiring and issuing a permit to ceremonial religious users for overnight camping in the restricted area, park personnel are able to prevent general recreational overnight campers from using the site free, unlike the "official" campground located at Bear Butte State Park Lake which has a fee. Only authorized ceremonial users, with permits are allowed in the restricted area.

JA 155.

III

ALL THE COURTS OF APPEALS WHICH HAVE RENDERED A DECISION ON THE SAME MATTER ARE IN CONCURRENCE WITH THE EIGHTH CIRCUIT COURT OF APPEALS HOLDING IN THIS PRESENT CASE.

Three United States Court of Appeals have considered free exercise claims seeking to restrict developments of government lands. Those courts include the Tenth Circuit Court of Appeals in Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981); the United States Court of Appeals for the District of Columbia in Hopi Tribe, et al. v. Block, et al., No. 81-1912, 81-1905, filed (D.C. Cir. May 20, 1983)[3], and the Eighth Circuit Court of Appeals in this present case, [Fools] Crow, et al. v. Gullet, et al., (8th Cir. filed May 10, 1983). All three Court of Appeals

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[3] Published in 10 Indian Law Report, page 2132, August, 1983.

concur in their holding that governments cannot be compelled to operate public property primarily as a religious shrine to satisfy a certain group of individuals particular religious interest.

As the Tenth Circuit Court of Appeals stated so succinctly in Badoni v. Higginson, supra, at 178:

> We are mindful of the difficulties facing Plaintiffs in performing sound religious ceremonies in the area frequented by tourists. What the Plaintiffs seek in the name of Free Exercise Clause is affirmative action by the government which implicates the establishment clause of the First Amendment. They seek government action to exclude others from the monument, at least for short periods, and to control the tourist behavior.
>
> Unquestionably the government has a strong interest in assuring public access to this natural wonder.

The Tenth Circuit continues by quoting from the learned Justice Hand:

> 'The First Amendment protects one against actions by the government,

> though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromise necessary in communal life.' [Citation omitted.]

The Petitioners simply have not demonstrated that the development or operation of the government property in question will prevent them from engaging in their religious practices or beliefs. Consequently, this Court should decline to review this case.

CONCLUSION

Petitioners have failed to show that the Eighth Circuit Court of Appeals decision in this above-entitled matter is in conflict with other decisions of the Court of Appeals or with opinions of this Court. Neither have the Petitioners shown that the factual issues

raised by this case are sufficiently important for this Court to exercise its extraordinary jurisdiction. For the foregoing reasons, the State requests this Court to deny Petitioners' request for certiorari.

Respectfully submitted,

MARK V. MEIERHENRY
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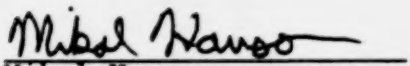

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CLERK

No. 83-434

In The

Supreme Court of the United States

October Term, 1983

FRANK FOOLS CROW, etc., et al.,

Petitioners,

vs.

TONY GULLET, etc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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No. 83-434

In The

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

SUPPLEMENTAL STATEMENT OF THE CASE

Respondents' Brief in Opposition to the writ necessitates a clarification of some of the critical facts in this dispute. According to Respondents' Brief at pp. 6-7, the "most controversial" construction on Bear Butte has been the new access road and parking lot. "The new road gives the Petitioners all-weather access into the traditionally

ceremonial use area and . . . the parking lot . . . does not occupy any of the area utilized for the ceremonial religious activity itself." What Respondents do *not* say, is that the road and parking lot provide routine and convenient access to the ceremonial site for 100,000 tourists yearly (Jt.App., p. 185). The lot is on a rise overlooking the ceremonial site, and less than one hundred feet away. At one end of the lot, also overlooking the ceremonial site, is a pavillion and gazebo, with exhibits describing the mountain's geology, zoology, and cultural uses. It is plain that the location and construction of these facilities was calculated to invite tourists to view Petitioners' religious activities, and has had precisely that effect. Benefits to Petitioners are incidental and unwanted.*

Bear Butte is more than a mile in girth, but Respondents have located their "recreational" facilities within sight of Petitioners' ceremonial area. It would have been easy to route tourist traffic to the other side of the mountain, where it would have had little or no adverse impact, if indeed Respondents were concerned with coexistence and not the establishment of a religious "zoo."

---

*Respondents aver that "many of the ceremonial users themselves requested" the road and lot. Respondents' Brief, p. 7. As noted in the Petition for the writ, p. 7, Respondents made this allegation in their testimony at trial, but could not identify with whom they had spoken except as "American Indians." Remarks of unidentified persons ("black," "white," or "Indian") are surely inadmissible hearsay.

REPLY TO RESPONDENTS' ARGUMENTS AGAINST GRANTING THE WRIT

1. The "Clearly Erroneous" Rule Does Not Apply to the Review of Conclusions of Law, or to Findings of Fact Based Upon an Erroneous Conception of Law.

Respondents urge denial of the writ on the grounds that "this Court does not grant certiorari to review evidence and discuss specific facts." Respondents' Brief, p. 8, citing *United States v. Johnston*, 268 U. S. 220, 227 (1925). While it is true that "pure questions of fact" are not reversed on appeal unless the trial findings are unsupported by substantial evidence, *Rogers v. Lodge*, 102 S. Ct. 3272, 3278-79 (1982), *Pullman-Standard v. Swint*, 102 S. Ct. 1781, 1789 (1982), the ultimate interpretation of adjudicated facts and the conclusions drawn from them are not subject to the "clearly erroneous" rule. *Johnston, supra; Harrison v. Indian Auto Shredders Co.*, 528 F. 2d 1107, 1120 (7th Cir. 1975) (balancing of interests); *United States v. Chicago*, 549 F. 2d 415, 425 (7th Cir. 1977) (whether discrimination had occurred). Also exempt is a finding of fact based on an erroneous conception of applicable law. *Southern Illinois Stone Co. v. Universal Engineering*, 592 F. 2d 446, 451 (8th Cir. 1979); *United States v. Singer Manufacturing Co.*, 374 U. S. 174, 194-95 (1963); *United States v. Texas Education Agency*, 564 F. 2d 162, 174 n. 17 (5th Cir. 1977), *cert. den.* 443 U. S. 915 (1979).

Respondents' arguments are misplaced here. The "fact" Respondents insist is subject to the "clearly erroneous" rule is that "the State's activities at Bear Butte have not interferred [sic] or infringed upon the Petitioners

[sic] religious freedom." Respondents' Brief, p. 7. Unquestionably this is a conclusion of law, not a "pure fact." The facts upon which such a conclusion might be based—facts going to the character of the State's activities and the nature of Petitioners' religion—clearly compel the opposite result, moreover. The District Court had before it the uncontradicted testimony of several Petitioners that State activities were disruptive of religious ceremonies. Respondents merely testified that they had not *intended* to be disruptive. Assuming that all witnesses were truthful, the only legitimate conclusion to be drawn was that Respondents unintentionally disrupted Petitioners' religious activities—and intent is not a defense to a First Amendment claim. *Stone v. Graham*, 449 U.S. 39, 41 (1980). There was simply *no* evidence (much less "substantial" evidence) to support a conclusion of non-infringement. The District Court must therefore be reversed on this issue *whether or not* the "clearly erroneous" rule is applied.

2. Respondents' Registration and Permit Requirements Subject Religious Activities to Discretionary State Administration.

Respondents complain that Petitioners "fail to realize that their registration and permit is not imposed on the Petitioners to enter Bear Butte, and conduct their religious activities, but . . . is required [only] for overnight camping." Respondents' Brief, p. 9. This is cutting a fine line, indeed. Petitioners' ceremonies generally last four days, and involve continuous fasting and praying (Jt.App., pp. 46, 59). Overnight use is therefore necessary. Re-

strictions on overnight use are restrictions on the duration and completion of ceremonies.

Respondents further argue that they can use registration to distinguish Petitioners from other park users, and thus limit overnight use to ceremonial needs. Respondents' Brief, p. 10. If, indeed, this is Respondents' motive, the means chosen are unduly restrictive. The simplest expedient would be to issue Petitioners permanent passes or vehicle stickers so they could use the site freely and be identified readily when necessary. Requiring them to apply for permission each time they intend to worship on the mountain gives Respondents too great an opportunity to deny access arbitrarily. Respondents have not alleged, nor will they stipulate, that they lack authority to exclude Petitioners from Bear Butte any time they wish, as they did for a whole month in 1982 (Jt. App., pp. 60, 178).

3. Agreement Among the Circuits that American Indians Lack Rights to Sacred Lands is a Compelling Reason for Granting the Writ, Not Denying It.

Respondents note that three Circuits have thus far denied American Indians' claims to the enjoyment of sacred lands, and suggest that this is grounds for denying the writ. Respondents' Brief, p. 11, citing *Badoni v. Higginson*, 638 F. 2d 172 (10th Cir. 1980), *cert. den.* 452 U. S. 954 (1981), *Hopi Tribe v. Block*, 10 I.L.R. 2132 (D.C. Cir. 1983), and the Eighth Circuit's ruling in this case. On the contrary, such a systematic denial of the First Amendment rights of persons of one race, and consistent failure to implement the unambiguous command of Congress that American Indians enjoy "access to sites" of traditional

religious significance (42 U. S. C. § 1996), is cogent reason for this Court to assert its discretionary jurisdiction and correct the Circuits.

Additionally, this dispute raises difficult new questions about the Establishment Clause, a Constitutional limitation that justly occupied much of this Court's attention last Term. Petitioners maintain that Respondents' display of traditional Indian religious practices as a tourist attraction, over worshippers' objections, is both a Free Exercise *and* an Establishment violation. It constitutes public involvement in the exhibition of a single denomination—exhibition which, in its very nature, is both involuntary and disruptive of the religion itself. Respondents argue that leaving Bear Butte in its natural state, to protect worshippers' solitude and freedom, would be an Establishment violation by placing a religious servitude on public property.* They maintain, in effect, that they are *Constitutionally powerless* to leave Petitioners in peace.

It is clear that sacred sites, many of them located on public lands, are absolutely essential to the enjoyment of most traditional American Indian religions. House Report No. 95-1308 (1978). The Constitutionality of protecting these places should be resolved unambiguously, before an

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*Whether Bear Butte *is* public property depends on the Constitutionality of the Act of February 28, 1877, 19 Stat. 254, which Petitioners have been litigating in other fora since 1980. Petition, p. 10. Petitioners' Complaint in this case challenged Respondents' title, but the District Court made no finding in this regard, noting simply that the State had purchased the site (from a non-Indian patentee) in 1962. Petition, p. 1a-1.

important part of this continent's heritage is destroyed in the mistaken belief that it lacks Constitutionally-secured status. This Court, of course, has that capacity and responsibility.

CONCLUSION

For the foregoing reasons, Petitioners respectfully suggest this Court should grant the writ, notwithstanding Respondents' arguments to the contrary, and establish unambiguously the status of American Indian religious freedom under the First Amendment.

Respectfully submitted,

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OCT 12 1983

No. 83-434

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

FRANK FOOLS CROW, *et al.*,
Petitioners,

v.

TONY GULLET, *et al.*,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION AND BRIEF ON BEHALF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, INDIAN LAW RESOURCE CENTER, NATIONAL INDIAN YOUTH COUNCIL, NATIONAL LAWYERS GUILD, NAVAJO NATION, PRESBYTERIAN CHURCH (U.S.A.), PUEBLO OF SANTA ANA, TRIBAL SOVEREIGNTY PROGRAM, UNITARIAN UNIVERSALIST CHURCH ASSOCIATION

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No. 83-434

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October Term 1983

FRANK FOOLS CROW, et al.,
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v.

TONY GULLET, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE

The Indian Law Resource Center and other amici hereby respectfully move, pursuant to Rules 36.1 and 42(3) of its Rules of Practice, for leave to file the attached brief as amici curiae in support of petitioners' effort to seek review of important First Amendment

questions concerning the extent to which the Constitution protects Indian religious freedom.

This motion and the attached brief are timely filed within the time allowed for filing of respondents' brief on the petition for certiorari.

Amici curiae are Indian nations, Indian rights organizations, churches and civil liberties organizations, all of which have either been involved in issues of religious freedom of the type presented in this case or which believe that encroachments on Indian religious freedom ultimately affect the religious freedom of all persons in the United States and that a clear, coherent and equitable application of the law is essential to protecting religious freedom of all people.

The proposed brief of amici addresses the need for granting the writ from a broad perspective not presented by the

parties themselves. The proposed brief discusses the importance of the constitutional question presented and the need for this Court to decide this unsettled question of religious access to particular natural sites.

Amici believe that the lower courts have been developing new and seemingly ungrounded rules and standards that are inconsistent with those fashioned by this Court. Amici also believe that the court below erred in its decision and that the judgment should be reversed.

Amici have requested the consent of the parties to appear. The petitioners have granted such consent, but the respondents have declined to do so. For the foregoing reasons, Amici respectfully move this Court for leave to file the attached brief amici curiae in support

of granting the writ of certiorari.

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National Indian Youth Council

National Lawyers Guild

Navajo Nation

Presbyterian Church (U.S.A.)

Pueblo of Santa Ana

Tribal Sovereignty Program

Unitarian Universalist Church Association

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No. 83-434

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1983

FRANK FOOLS CROW, et al.,
Petitioners,

v.

TONY GULLET, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTION RIGHTS, INDIAN LAW RESOURCE CENTER, NATIONAL INDIAN YOUTH COUNCIL, NATIONAL LAWYERS GUILD, NAVAJO NATION, PRESBYTERIAN CHURCH (U.S.A.), PUEBLO OF SANTA ANA, TRIBAL SOVEREIGNTY PROGRAM UNIVERSALIST UNITARIAN CHURCH ASSOCIATION

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October 12, 1983

STATEMENTS OF INTEREST OF AMICI CURIAE

American Civil Liberties Union

The American Civil Liberties Union is a non-profit organization dedicated to the preservation of civil liberties, particularly those guaranteed in the First Amendment. Since its founding in 1920, it has engaged in numerous lawsuits designed to protect the rights at issue in this case. Its membership includes almost 250,000 people throughout the United States who States who are dedicated to the protection of civil liberties. The issues raised in this case, especially as they impact upon the free exercise and establishment clauses, are issues vital to its organization.

Center for Constitutional Rights

The Center for Constitutional Rights was born out of the southern civil rights movement of the 1960's. Since that time it has developed legal theories in support

of constitutional rights including the First Amendment in many areas. In June, 1982, CCR joined as amicus curiae in Hopi Indian Tribe v. Block to support religious rights in the San Francisco Peaks. Other cases have included the Wounded Knee defendants and Leonard Peltier, South Dakota v. Means, and other religious freedom lawsuits.

Indian Law Resource Center

The Indian Law Resource Center assists Native Americans in protecting their legal rights, human rights, cultures and religions through a program of research, public education and legal assistance.

National Indian Youth Council

The National Indian Youth Council, Inc. (NIYC) is a national, non-profit Indian organization which was founded in Gallup, New Mexico, in 1961. Since that time the NIYC has engaged in a number of organizing activities and legal challenges which have

attempted to preserve and enrich traditional Indian communities and protect Indian traditions both on and off the reservation. Toward that end NIYC has been extensively involved in litigation which has sought to insure the survival of the American Indian religions. NIYC is deeply concerned about the impact of the decision below upon traditional Indian religions should this Court allow that decision to stand.

National Lawyers Guild

The National Lawyers Guild is a nationwide membership organization of 7,000 lawyers, legal workers, law students and jailhouse lawyers with 105 chapters throughout the United States. Since its founding in 1937, the Lawyers Guild has been dedicated to seeking social equality, freedom to dissent and human rights. The Guild has regularly appeared as amicus curiae in defense of civil liberties and

treaty rights of Native people. It is in that context that the Guild supports petitioners in this case.

Navajo Nation

The Navajo Nation is a recognized nation of Indians which is attempting to sustain First Amendment protection for those sites which are significant in their traditional religions.

Presbyterian Church (U.S.A.)

The Presbyterian Church (U.S.A.) is a national religious denomination, formed in June of 1983 by the reunion of two Presbyterian Churches which together now have 3,172,127 members in 13,225 neighborhood congregations, and 21,255 ordained clergy.

The Presbyterian Church (U.S.A.) also has a long history of ministry with Native American people and advocacy for their human and civil rights, as well as scrupulous observance of treaty commitments. Amicus PCUSA is compelled by these

commitments to urge a review of the arguments in this case.

Pueblo of Santa Ana

Pueblo of Santa Ana is a centuries-old traditional Indian pueblo located on the Rio Grande River in Sandoval County, New Mexico. The ancient religious practices of the Pueblo includes important ceremonies and observances which take place at sacred sites and shrines located on former Pueblo lands which are now controlled by the federal Government and the State of New Mexico. Therefore, the Pueblo is vitally interested that its right to continue to practice its religion at these sacred sites be fully protected under the First Amendment of the Constitution and accordingly appears as amicus curiae for petitioners in this case.

Tribal Sovereignty Program

The Tribal Sovereignty Program is a non-profit public foundation concerned

with small scale economic development in 10 Indian communities as well as the protection of Native rights. The program has actively supported Santa Clara Pueblo's efforts to halt geothermal development that threatened their religious gathering area.

Unitarian Universalist Church Association

The Unitarian Universalist Church Association is a voluntary Association of 1,000 societies and fellowships in North America. It joins in submitting this amici curiae brief based upon its policy of amicus intervention in First Amendment religious freedom cases.

INTRODUCTION

Amici understand that this Court disfavors amicus curiae briefs at the petition for certiorari stage of litigation except in extraordinary cases.

Amici take this extraordinary step in the belief that Fools Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), aff'd No. 82-1852 (8th Cir. 1983) raises issues of particularly great constitutional concern.

This case concerns serious government intrusion into an area that has previously been most protected under the First Amendment. The issues in this case reach to the foundation of American constitutional freedoms -- the right of a people to freely exercise their religion without interference from governmental authorities. Amici ask the Court to review the First Amendment issues raised by this case because this Court has never decided the important questions: What kind of action constitutes a burden on religious practice where religious access to particular natural sites is involved; and, what constitutes a sufficiently

compelling state interest to warrant state interference with Indian religious practices.

Amici also argue that confusion exists among the lower courts regarding the issues presented here which ought to be corrected by this Court.

Amici believe as well that the present confusion and the misguided decisions in this and other similar cases constitute a very grave threat to Indian religious freedoms.

FACTS

The principal facts in this case are not disputed. Bear Butte has been central and essential to both Lakota-Sioux and Tsistsistas-Cheyenne religious practice since time immemorial. The vision quests held there provide the principal means by which practitioners of both religions maintain their covenants with the Creator. The religious ceremonies held there

require solitude and an unaffected natural environment, conditions that have almost ceased to exist because of defendant's tourist development and construction projects.[1] The State of South Dakota purchased this well known religious site in 1962 and began to build a tourist facility there. In the summer of 1982, the State Parks Department announced that entrance fees would be charged, that permits would be required for overnight camping and that the length of a person's stay at Bear Butte would be regulated.

Petitioners, Lakota-Sioux and Tsistsistas-Cheyenne Medicine and traditional leaders, allege that this action

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(1) Father Peter John Powell, People of of the Sacred Mountain (San Francisco: Harper and Row, 1981); Donna Hedburg, "Nowahus, Bear Butte, Sacred Mountain of the Cheyenne" (Unpublished Thesis, 1976); Anita Parlow, ed., A Song From Sacred Mountain (Pine Ridge: Oglala Lakota Legal Rights Fund, 1983).

by the State of South Dakota in developing the commercial tourist facility at Bear Butte State Park interferes with their religious practices to the extent that they cannot freely or properly exercise their religion. Fundamental to Lakota and Cheyenne spirituality is an underlying belief that what is most important is maintenance of a proper balance between the spiritual and the natural world. Lakota and Cheyenne beliefs and practices are centered in sacred sites where ceremonies occur. Petitioners claim that practitioners of traditional Indian religions have a constitutionally protected right, equal to that of other persons, to practice their religion free from governmental interference.

ARGUMENT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION TO THIS COURT FOR THE FIRST TIME.

This case presents to this Court for the first time the question of the extent to which the religious use and religious character of a particular natural site are protected by the First Amendment. This Court has never decided a case in which government action is alleged to interfere with long-established practices which depend entirely upon free and undisturbed access to particular sacred sites or particular natural locations. The fundamental question is two-fold: What actions constitute a burden on religious practice where religious access to particular natural sites is involved; and what constitutes a sufficiently compelling government interest to warrant state interferences with Indian religious practices.

There have been an increasing number of cases in recent years involving restrictions on access by Indian people to religious sites. These cases are mentioned below. More such cases are likely to arise. In one of the other recent cases, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), plaintiffs are also expected to petition for review in this Court in this term.

II. CONFUSION ABOUT THESE ISSUES EXISTS AMONG THE LOWER FEDERAL COURTS.

The relevant decisions of this Court have provided little guidance to the lower courts in deciding cases involving access to sacred sites for religious practice. As a result, new and seemingly ungrounded rules and inconsistent standards are being developed by the lower courts which appear to be out of keeping with principles established by this Court. This Court ought to consider and determine how such controversies are to be decided.

Existing standards established by this Court may be quickly summarized: Where government action imposes a burden upon religious exercise, that burden on free exercise must be balanced against the importance of the government's interest at stake. Cantwell v. Connecticut, 310 U.S. 296 (1940); Sherbert v. Verner, 374 U.S. 398 (1963); and Wisconsin v. Yoder, 406 U.S. 205 (1972). In Yoder, 406 U.S. at 215, the Court wrote that "only those interests of the highest order and those not otherwise served overbalance legitimate claims to the free exercise of religion." Subsequent decisions have identified a limited number of government interests of sufficient magnitude in each case to warrant the particular restriction on religious freedom involved. The cases in which the governmental interest was upheld have involved interests of the highest magnitude. These have included:

national defense, Gillette v. United States, 401 U.S. 437 (1971); and the maintenance of the social security system, United States v. Lee, 455 U.S. 452 (1982); Widmar v. Vincent, 454 U.S. 263 (1981). None of these decisions consider the questions raised by the problem of government action restricting religious access to and use of sacred sites.

In two cases involving Indian access to particular religious sites, one decided by the Tenth Circuit Court, Hopi Indian Tribe v. Block, No. 81-0481, 8 I.L.R. 3073 (D.D.C. 1983) aff'd. sub nom Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), and one decided by the Sixth Circuit, Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980), the lower courts have begun to develop a new standard or rule under which the court determines whether the practice involved is

"central" or indispensable to the Indians' religious belief. Sequoyah at 1164.

In Sequoyah, the court found that the land which was flooded by the Tellico Dam was not "central to the religious practices" of the plaintiffs and that therefore no burden on free exercise was shown. The court denied relief despite allegations that the flooding would interfere with the religious exercise of the plaintiffs.

In Hopi, supra, a skiing facility in the San Francisco Peaks was alleged to interfere with the Hopi and Navajo religions. Relief was denied on the ground that the sacred peaks were not "central" or "indispensable" to the Indians' religious belief. On appeal, the District of Columbia Circuit Court appeared to move away from the "centrality" standard but decided that plaintiffs seeking to restrict government land use

must at minimum show that the government's proposed land use would impair a religious practice that could not be performed at any other site. The Court decided such a burden had not been shown. Wilson v. Block, supra.

In this case, the problem of the inconsistent standards becomes clear. The court below agreed that Bear Butte is central to both Lakota and Cheyenne religions but nevertheless found that no burden had been shown.

In another case, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981), the Tenth Circuit ruled that the interest in maintaining the Glen Canyon Dam and Reservoir that is "inextricably" linked to a general water system is sufficiently compelling a governmental interest to warrant infringement of religious practices. The Tenth Circuit also ruled that protection of the

sacred site at Rainbow Bridge and the regulation of tourism there would create a "government managed religious shrine" in violation of the Establishment Clause. Thus this decision raises the problem of distinguishing between government land management which violates the Establishment Clause and that which merely avoids infringement of protected religious practices. Again, guidance is called for from this Court.

Moving in the opposite direction, however, the District Court for the Northern District of California in Northwest Indian Cemetery Association v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983) enjoined the harvesting of timber and the construction of a road which would have intruded upon sacred locations and interfered with Indian religious practices. In its opinion, the District Court announced that it would apply the existing law to

cases that involve sacred land as it would to any other religious expression situation. Northwest Indian Cemetery Association is currently being appealed to the 9th Circuit. Appeal filed July 22, 1983, No. 83-2225 (9th Cir.).

Thus, the decision in the present case is just one of several such decisions in which the lower courts appear to be adrift, without definite guidance from this Court. The result has been a series of inconsistent decisions and new "rules" that appear to be out of keeping with the principles of the First Amendment. The new standards appear to Amici to be unfounded in this Court's decisions and to be contrary to the principle enunciated in Thomas v. Collins, 323 U.S. 516, 530 (1944) and Wilson v. Block supra that the courts are not to become involved in determiniations of the validity or importance of the religious belief or

practices involved. The courts appear to be in the inappropriate position of determining theological significance of the sites and the religious practices involved.

Moreover, the decisions in the lower courts in cases involving natural sites leave the disturbing impression that Indian religious practices may be accorded less protection under the First Amendment than other religious practices. Certainly no such principles could be constitutionally justified. If development of tourism at Bear Butte is sufficiently important to warrant interference with Indian religious practice, one ought to ask whether are are any substantial limits on states' powers to interfere with religious access to sacred sites.

Only this Court can settle these troubling and increasingly urgent issues and provide the standards to guide the lower courts in this relatively new area.

III. THERE IS A SERIOUS THREAT TO TRADITIONAL INDIAN RELIGIONS WHICH REQUIRES THIS COURT'S ATTENTION.

We must add that the concern of Amici is very much increased by our awareness that Indian religious practices, particularly traditional religious practices, are gravely threatened by the trend of the lower court decisions and the increasing development and desecration of sacred sites.(2) Native religions are unique and deeply connected to sacred places. Continued encroachment could bring another disastrous consequences. To Native practitioners, land is a living part of a

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(2) A distinction may be made here between judicial treatment of First Amendment cases which involve individual rights and those land theology cases like the present one which involve as well the collective right of Indian people to actively practice and control their spirituality. Rice, "Native Americans and the Free Exercise Clause," 28 Hastings L. J. 1509 (1977).

comprehensive balance of life forms that must continue in natural harmony if the spirituality, indeed life itself, is to survive. Without a functioning religious foundation, Indian tribes and communities, indeed Tribalism itself, could be subject to disintegration and destruction. See, e.g., Vine Deloria, Jr., Metaphysics of Modern Existence (New York: Harper and Row, 1979).

CONCLUSION

This is an important case which clearly presents an issue which has not before been decided by this Court. This is an appropriate case in which this Court may resolve this issue by granting the petition for certiorari.

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October 12, 1983

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No. 83-434

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

FRANK FOOLS CROW, *et al.*,
Petitioners,

v.

TONY GULLET, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION AND BRIEF ON BEHALF OF AMICI CURIAE CHRISTIC INSTITUTE, *ET AL.*

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No. 83-434

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE

The Christic Institute herein respectfully moves, pursuant to Rules 36.1 and 42(3) of its Rules of Practice, for leave to file the attached brief as amicus curiae in order to support petitioner and to present its views, and the views of other amici, on the First Amendment questions presented here which concern the extent to which the constitution protects Indian religious freedom.

This motion and the attached brief are filed within the time allowed for filing of respondent's brief on the petition for certiorari.

Amici address the First Amendment standards which provide constitutional protection for Indian religious expression involving sacred land.

Amici believe that the courts below, while recognizing the central stature of Bear Butte in the religions of Petitioners, failed to adequately comprehend the burden on Petitioners' their religious practice and ritual of the State tourism development program on Bear Butte. Amici also believe that the court below erred by failing to adequately analyze the state's alleged interest in tourism to determine whether that interest is compelling, and whether any alternatives existed for advancing that interest that would be less restrictive of Petitioners' relgious freedom.

Amici are a consortium of Indian nations, Indian rights organizations, Churches and Temples of several denominations and civil liberties organizations and individuals, all of whom have either been involved in a prolonged struggle for religious freedom of the type represented in this lawsuit or who believe that encroachments on Indian religious freedom ultimately affect the religious freedom of all citizens of the United States. A clear, coherent and equitable application of the law is essential to achieve the goal of truly protecting religious freedom of all people. This case embodies that question in that it asks whether the constitution will be interpreted to protect religious expression that is quite distinct from those that are more typically Judeo-Christian in origin and perspective.

If this Court does not review the decisions below, the lower courts will continue to apply the law in such fashion that could make extinct traditional Indian religions. Such a possibility is certainly a fundamental reason for First Amendment protection.

Amici will clearly be affected by the outcome of this litigation, both as practitioners themselves or as persons who live in a society that is committed to the deepest form of pluralism--a pluralism that would be richer if it continues to include a religious tradition that requires a sophisticated balance between the spiritual and physical landscapes.

Amici have tried to obtain consent of both parties to participate in this case. The petitioner has granted such consent, but the Respondent is unwilling to do so. For the foregoing reasons, Amici respectfully move this Court for leave to file

the attached brief amicus curiae in support of granting the writ of certiorari.

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Counsel for Amici

QUESTION PRESENTED

Is South Dakota's interest in developing as a tourist attraction one of the most important of Native American religious sites of a sufficiently compelling nature to justify the consequent burden this development places upon the First Amendment freedoms of those Sioux and Cheyenne who have worshipped there from time immemorial as a central and indispensable part of their religious faith and ritual.

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No. 83-434

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ON PETITION FOR WRIT OF CERTIORARI
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FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CHRISTIC INSTITUTE, et al.

The organizations and individuals joined herein file this brief amicus curiae in support of the petition of Frank Fools Crow, et al. pursuant to Rule 36.1 of the Rules of the Supreme Court.

THE INTEREST OF AMICI

Americans for Indian Opportunity

Americans for Indian Opportunity is an Indian controlled organization that regularly works to seek protection for economic, human, political and religious rights of Indian people. The AIO joins this amicus curiae brief as a regular part of its work to contribute to the rebuilding of Indian nations.

Central Conference of American Rabbis

The Central Conference of American Rabbis is the professional rabbinic association of Reform Rabbis throughout the United States, Canada and Abroad. Founded in 1889, the Central Conference now numbers some 1400 rabbis serving about 700 congregations. The Central Conference has enacted a resolution in support of Indian Treaty rights and in that context intervenes as amicus curiae in this matter

of religious freedom which is of deep significance to all Native and Indigenous people.

The Christic Institute

The Christic Institute is a public interest law firm and policy center established in 1980 to bring spiritual and religious values to bear, in both traditional and contemporary ways, on public consciousness and policy making. The Institute is particularly sensitive to erosion of the constitutional guarantee of the free exercise of religion.

Reverend David Eaton, Senior Minister, All Souls Church Washington, D.C.

As an outspoken Church leader, Reverend David Eaton has promoted the rights of Black, Native American, Latino and Asian-Americans to enjoy the opportunity to express their religion and spirituality in their own terms. Reverend Eaton has long championed the rights of Native people and

in that context intervenes as amicus curiae in this lawsuit.

Gunaratana, Monk at Washington Buddhist Vihara Society and Buddhist Chaplain at American University

As a Buddhist Monk, I very strongly believe that religions of the people in the United States are protected by the First Amendment of the American Constitution. People came to this country from other countries primarily because of discriminations -- political, religious or otherwise -- of their home countries. We would appreciate if the same people who came seeking religious freedom would respect the religions that people practiced in North America before they arrived. We, as citizens of this country, have a responsibility to appear as amicus curiae when religious freedoms are violated.

International Indian Treaty Council

The International Indian Treaty Council represents traditional Indian governments from 98 nations in the Western Hemisphere as well as non-governmental Indian organizations and other groups fighting for Treaty rights, land rights and basic human rights. The Treaty Council supports this lawsuit as a component of its overall effort to represent Native and Indigenous people both domestically and within the United Nations on issues that concern Indian religious freedom.

Piscattaway Indian Nation

The Piscattaway Indian people are the Indigenous people of the state of Maryland and have been deeply involved in a prolonged struggle for religious freedom with the Department of the Interior. We vigorously support Indian religious freedom in all parts of the Western Hemisphere and the success at Bear Butte would also have

a favorable impact in our continuing struggle. May our Mother Earth endure her sufferings.

Plenty International/The Natural Rights Center

Plenty International is a not-for-profit organization with Non-Governmental Organization status in the United Nations. The purpose of the Natural Rights Center is to establish perspective about natural rights and the power to bring about peaceful transformation of human values and dignity. Plenty International/The Natural Rights Center have long struggled for human and economic rights of Native and Indigenous people and appears as amicus curiae in this case as part of its on-going work to support traditional Indian people in their efforts to freely express their spirituality.

Alan Sanborn, Director, Native American Concerns of the Episcopal Church

Alan Sanborn, Penobscot and officer of

Native American Concerns of the Episcopal Church has been involved in work with Native and Indigenous people in Alaska and the lower 48 states to protect and affirm cultural and religious tradition. Whether religious expression is allowed at Bear Butte will affect all Native people.

United Church Board for Homeland Ministries, United Church of Christ

The United Church Board for Homeland Ministries is the domestic mission arm of the United Church of Christ, and as such, bears major responsibility for Indian rights concerns. The United Church Board of Homeland Ministries is committed to participate in litigation on behalf of traditional Indian religious practitioners.

The decisions denying Petitioners First Amendment claims in the courts below permit significant state erosion of two of the Nation's Native religions. The courts

below misunderstood First Amendment protections of religious freedom and misapplied the appropriate constitutional tests which protect that freedom. The decisions threaten to spread a dangerous confusion over this area of the law. Amici stand with Petitioners in their defense of Native American religious freedom and offer here their brief in support of the grant of writ of certiorari requested by them.

SUMMARY OF ARGUMENT

This case involves the familiar First Amendment "balancing test" in a context never before addressed by the Supreme Court. Here the "balancing test" requires weighing the interests of the State of South Dakota in promoting tourism at an important, traditional Native American religious site, Bear Butte, against the rights of those Native Americans whose worship and ritual at the site are

rendered impossible and ineffectual by the intrusions and desecrations of tourists.

The principal defect in the decisions below is that they did not adequately weigh these competing interests, nor consider the availability of less restrictive alternatives. Because of this failure the rulings below are in direct conflict with the decision in Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983) appeal filed July 22, 1983, No. 83-2225 (9th Cir.) where the appropriate weighing of interests was properly undertaken.

Bear Butte, designated by South Dakota as a state park, is central and indispensable to Petitioners' Lakota and Tsistsistas religions. The sacred vision quests held there provide the principal means by which both religions maintain their covenants with the Supreme Being.

The religious ceremonies held there require solitude and a pristine natural environment, but now seldom succeed because of Respondents' tourist development and construction projects.

The district court misapplied the two-part test for balancing the burden on Petitioners' religious freedom against the state's countervailing interests. The court incorrectly defined infringement of religious freedom at Bear Butte as the denial of physical access to ceremonial sites. So it found nothing wrong in Respondents' restrictions on Petitioners' religious conduct. The court weighed the burden upon Petitioners' religious freedom without considering that the conditions for Petitioners' ritual practices are ceremonially central and indispensable to their religious efficacy. Respondents were moreover spared the task of finding less restrictive alternatives to the

admitted burden on Petitioners' religious freedom.

The State promotes Petitioners' religions as a tourist attraction. By interpreting Respondents' construction activities and access restrictions as permissible assistance to Petitioners, the district court understood Petitioners to request further state aid in violation of the Establishment Clause. But the termination of this putative "assistance" and protection of the existing and historic religious nature of Bear Butte would involve Respondents neither in establishment of nor an excessive entanglement with Petitioners' religions.

ARGUMENT

I. BEAR BUTTE IS CENTRAL AND INDISPENSABLE TO PETITIONERS' RELIGIONS.

The importance of Bear Butte to the Lakota and Tsistsistas religions is well documented. See generally, D. Hedburg,

"Nowahus, Bear Butte, Sacred Mountain of the Cheyenne" (1976) (unpublished Master's thesis explaining various religious uses); P. Powell, People of the Sacred Mountain, A History of the Northern Cheyenne (1981). Both religions hold that Bear Butte is the center of the world and the indispensable altar for lonely communion with the Supreme Being. Affidavit of Laird Cometsevah, Jt. App. p. 23; Affidavit of Larry Red Shirt, Jt. App. pp. 36-37. The Tsistsistas prophets received the covenant at Bear Butte from the Creator who dwells within the sacred mountain; and according to the Lakota, the Great Spirit issues his commandments there.

The high deities of the Tsistsistas religion, the Creator and Mother Earth, join at Bear Butte to form the world's axis where the sacred Four Directions

meet. Sacred Mountain is the pillar that supports the firmament above and forms the highest point on earth. This mountain connects the spirits above the earth to those below. Eternal in time, the Butte stands as a monument to and remnant of the Creation. D. Hedburg, supra.

Bear Butte is known to the Tsistsistas as the "Learning Hill." In a cave deep within the mountain the prophets Sweet Medicine and Erect Horns were given the sacramental Medicine Arrows and Buffalo Hat by the high gods to guarantee the survival of the Tsistsistas Nation. The masculine sanctity of the Arrows and the feminine power of the Buffalo Hat are exhaustible and must be regenerated in the Sun Dance and Arrow Renewal. These two ceremonies, taught to the prophets at Bear Butte, reenact and renew the covenant. Participants take on the roles of the

prophets and the gods. Temples and altars, such as the Medicine Lodge and Arrow Lodge, replicate the sacred mountain, Nowahus -- Bear Butte -- the original and most holy structure. Tsistsistas homes and villages point to the mountain and each believer makes a pilgrimmage there at least once. See G. Grinnel, The Cheyenne Indians, Their History and Ways of Life (1923).

In the core religious experience of the vision quest, the mountain itself becomes an altar upon which the seeker stands alone. To experience a vision he must pray and fast in solitude at a questing place. P. Powell, Sweet Medicine (1969). The pledger purifies himself in a sweat lodge near the mountain with his instructor, family and other supporters. He then ascends to a place prepared for his quest where he will pass four days

exposed to the elements and spirits. He sets out tobacco and flag offerings at his prayer spot and may recline in a pit dug out for him. His supporters remain in meditation at the foot of the mountain. If the seeker is worthy, a spirit breaks his solitude, offering special power that can be summoned for protection and curing. The vision answers a personal spiritual crisis and allows the pledger to reenter social life with renewed purpose. J. Stands In Timber, Cheyenne Memories (1967).

Lakota religion is rooted in the Sacred Calf Pipe given the tribe by White Buffalo Calf Woman as a covenant with the Great Spirit, Wakan Tanka. The pipe is the central sacrament that binds the Seven Sacred Rituals by which the Lakota communicate with the Great Spirit. J. Brown, The Sacred Pipe (1953). The pipe is

offered to the Four Directions, Grandmother Earth and the eagle above. Through the pipe and its smoke the supplicant draws the universe to his personal center. The Great Spirit, a part of all things, responds to such prayers. The most serious supplications and offerings are made at the center of the world, upon Bear Butte. T. Mails, Fools Crow (1979).

The Lakota pipe fast has most of the elements of the Cheyenne vision quest, but the attainment of a vision may not be essential. The pledger may wish only to give thanks or pray for a favorable outcome in a crisis, such as the serious illness of a relative. The vision is the key element, however, in the process of religious training. A mystical experience or misfortune may lead to a recurring dream or perplexity requiring consultation with a spiritual advisor. The interpretation is confirmed or further elucidated by

the revelation of the vision quest. Direct communication with the Great Spirit may lead to apprenticeship with a holy person who can nurture this newly won relationship. With ordination, one's power is put to the service of others and must be renewed periodically on the mountain. W. Powers, Oglala Religion (1977).

Fools Crow has described the quest:

> To make the vision-questing place, I set four tall cherry tree branches in the ground to mark the corners of an eight foot long by six foot wide rectangle.
>
> When the pledger is within the enclosure he faces in whatever direction he is praying to. He will look up when he prays to Tunkasila and Wakan-Tanka, and he will look down when he prays to Grandmother Earth. If he stays there several days he will follow the sun and turn clockwise as he prays, whether he sits or stands. He can lie down at night and part of the time during the day, depending on how tired he is.

T. Mails, supra, at 121.

The purpose of the quest is to become

humbled before the Great Spirit in order to receive a blessing. Purity and emptiness are achieved through the sweat bath, the fast and lonely and quiet meditation. Bear Butte is a power place amongst power places and the place where Medicine Men must renew their connection to the Great Spirit, Tunkasila. A. Parlow, A Song from Sacred Mountain (Pine Ridge 1983).

The Locus of the Creation, Bear Butte has power only to the extent that it is preserved in its natural topography. Freedom from intrusive distraction is required to protect the delicate sacred communications there. Without Bear Butte, both religions' bonds to the Supreme Being would be broken.

II. PETITIONERS' FREE EXERCISE OF RELIGION HAS BEEN SUSTANTIALLY BURDENED.

The district court correctly stated the

two-part balancing test by which the state's conduct is to be measured:

> First, a court must decide whether the conduct, regulation, or law at issue burdens the free exercise of religion. Second, the restriction on the free exercise of religion must be balanced against the importance of the state's interest in the regulation or restriction. Id.

The recent proliferation of construction and tourist interference at Bear Butte has seriously reduced Petitioners' successful religious use of the mountain (Jt. App. pp. 20-22, 33, 42-43). Respondents have burdened the vision quests in several ways: (1) by constructing roads, parking lots, buildings and viewing platforms that in the Petitioners' religions are deemed to desecrate Bear Butte; (2) by promoting and facilitating the presence of tourists on Bear Butte, which tourists violate the solitude necessary to successful worship by crowding around vision

seekers, snapping photographs, taking sacred offerings, making noise and violating ritual standards of purity; (3) by preventing access through restrictive permit regulations and then restricting ceremonies at the alternate site at Bear Butte Lake; and (4) by requiring registration at the Visitor Center. Cf., Crow v. Gullet, 541 F. Supp. 785, 791 (D.S.D. 1982) aff'd on basis of Dist. Ct. opinion 706 F.2d 856 (8th Cir. 1983) (per curiam).

To establish the religious quality of the practices, a claimant must show that the pertinent beliefs are religious, that the burdened conduct is based on those beliefs and that the beliefs are sincerely held. Id. at 215-16. The district court concluded, "there is no dispute that plaintiffs' practices are based upon a

system of belief that is religious and sincerely held." 541 F. Supp. 785, 790. The test for religious quality requires also that the protected practices be serious, "rooted" in the faith, "inseparable and interdependent." Wisconsin v. Yoder, 406 U.S. at 215.

In cases involving Native American claims to free exercise of religion on government controlled sacred sites, lower courts have created a test, not supported by Yoder or other decisions of the Supreme Court, which conditions First Amendment protection of Native American religious practices upon the "centrality" of that practice to the particular religion. See e.g., Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir. 1980), cert. denied 449 U.S. 953 (1980); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), cert. denied,

452 U.S. 954, 101 S.Ct. 3099 (1981). Cf Hopi Indian Tribe v. Block, 8 I.L.R. 3073 (no. 81-0481, D.D.C. 1981), aff'd sub-nom Wilson v. Block, 708 F.2d 735 (D.C. Cir 1983) (rejecting centrality test in favor of "indispensable" test).

An infringement of free exercise occurs when conduct is compelled which violates religious dictates, or conduct is prohibited which is religiously mandated. Yoder, supra. In this case, the state's activities preclude Petitioners' exercise of their religion in accordance with their beliefs by denying the ritual integrity and religious efficacy of the practices that are central to Petitioners' religions. Respondents stipulated that the sacred mountain is "important and indispensible" (Jt. App. pp. 94, 163). The court took notice that Bear Butte is central and indispensable, (Jt. App. p.

188) and that "silence and solitude are essential in their mind to accomplish what they wish to accomplish" (Jt. App. p. 202). If South Dakota develops Bear Butte as a tourist attraction it can no longer be effectively used for the religious practices to which it has been dedicated from time immemorial.

Although the court below found "centrality" in this case it cited as precedent for its ruling such cases as Hopi and Sequoyah in which centrality was not found. E.g., 620 F.2d at 1163-64. Because the Hopi and Sequoyah cases also involved denial of physical access to sites, the court simply applied their rules as an applicable standard for this case. But here the state's construction and tourism activities interfere with "an essential part of [Petitioners'] religious belief and

and practice." Yoder, 406 U.S. at 219. This centrality of Bear Butte to Petitioners' religions, for the very reasons stated by the Sixth Circuit in Sequoyah, demand the different result here of protection against the burdens imposed by South Dakota.

Any construction at Bear Butte burdens Petitioners' religious expressions because it violates the natural topography, diminishes the power of Sacred Mountain and causes ritual failures.

> In order for the Butte to hold its sacred powers, it must remain in its natural state as it was created in the beginning. The power of the Butte is diminished each time a permanent man-made structure or alteration is made.

Affidavit of Larry Red Shirt, Jt. App. p. 40. Such desecration precludes use of the land for its traditional spiritual purposes. "Any obstruction or building of that nature in sight...is a distraction

and it just pulls our meditation and concentration away from prayer." Jt. App. pp. 109, 119.

Tourist noise, traffic and other interruptions "interferes with the Vision Quest, because it interferes with communication with the spirit world; and destroys the strength of the ceremony itself." Affidavit of Larry Red Shirt, Jt. App. p. 39. "it is of the utmost importance that Bear Butte may not be contaminated in any way..." (Jt. App. p. 122).

> When we go on a fast, we wish to be excluded from the world, the noise even, and that's why we fast and that's why we go there without food, without water. We want to put away those things that make our life a pressure. We want to fast; we want to suffer; we want to give back to God, the Great Spirit, something that he made of me here in the world.

Affidavit of Pete Catches, Jt. App. pp. 108-09.

But, with tourist development reaching 100,000 visitors a year at the Butte, it is now impossible to fast according to the ceremonial rules that require seclusion from the world.

Respondents' permit regulations require that Petitioners register whenever they worship overnight at the sacred mountain. The issuance of permits is a discretionary matter and there are no written guidelines (Jt. App. pp. 132-33, 176-77, 179-80)--in seeming contradiction to the court's own standards that licensing "without narrow, objective standards" in unconstitutional, 541 F. Supp. 785, 789.

If this case is measured by the "centrality" test, then the burden on Petitioners' free exercise of religion is evident; if the centrality test is not used then Petitioners religious exercise has indeed been unconstitutionally burdened by "the government's proposed land

use [which] would impair a religious practice that could not be performed at any other site." Wilson v. Block, supra, 708 F.2d at 744.

III. THE STATE HAS NO COMPELLING REASON FOR RESTRICTING PETITIONERS' RELIGIONS.

A burden on the free exercise of religion is constitutionally tolerable only if outweighed by state interests that are "compelling." "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Sherbert v. Verner, 374 U.S.398, 406 (1963) quoting from Thomas v. Collins, 323 U.S. 516, 530 (1944); See also Cantwell v. Connecticut, 310 U.S. 296 (1940). In Wisconsin v. Yoder, 406 U.S. at 215 it was said that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of

religion." Even a superficial consideration of the state interest involved here, that of promoting recreational opportunity, would reveal less restrictive alternatives. That the State controls 200,000 acres of parkland indicates that recreational interests can be "otherwise served" by the state of South Dakota away from Bear Butte.

The court below went astray by failing to adequately weigh the burden on Petitioners' religions against alleged compelling interests of the state. In fact it may well be questioned whether the court below ever did enter upon this crucial step of First Amendment analysis. Where, as here, only commercial and recreational interests in tourism are counterpoised to religious freedoms, a careful and detailed analysis is required to adequately weigh the interests at stake. This the court below failed to do. See

Northwest Indian Cemetery Protective Assn. v. Peterson, 565 F. Supp. 587 (N.D.Cal. 1983) for an example of careful application of the "balancing test."

If it had made such an analysis the court would have had to compare the state's interest in tourism to other truly compelling interests which have been recognized by the Supreme Court, for example the interest in national security, Gillette v. U.S., 401 U.S. 437 (1971); or maintenance of a social security system, U.S. v. Lee, 455 U.S. 252 (1982). Since not just any colorable governmental interest may outweigh religious freedom, a closer analysis of the state's interest in tourism is required than that undertaken by the court below. Moreover, even if the state of South Dakota could advance a compelling need to satisfy interest in the unique topographical and cultural features

of the Sacred Mountain, or more generalized interests in enjoying outdoor pursuits in the Bear Butte area, means less restrictive of plaintiffs' rights could have been found to accomodate those interests. Cf. Northwest Indian Cemetery Protective Assn. v. Peterson, supra, 565 F. Supp at 596.

The court below reasoned that to halt construction at Bear Butte would force Respondents to "waive statutory power to manage and develop the state park in the public interest," 541 F. Supp. 785, 791. But park officials do not jeopardize their authority by adopting tourism development programs that do not infringe upon important First Amendment freedoms.

The court found a compelling interest in "preserving the environment and the resource from further erosion and protecting the health, safety and welfare of park visitors and in improving public

access." Id. at 794. There was no evidence that access by Petitioners to Bear Butte to practice their religious ceremonies had a significant adverse environmental effect. There was no evidence of serious erosion endangering park visitors. Increased public access, although a more specific value, is surely not compelling nor of the "highest order." Further recreational development of a few hundred acres, to which the public already had ample access, and which will only further Petitioners' religious freedoms, cannot justify Respondents' restrictions.

Precedent for the state interest asserted to support tourist desecration of the site was found by the court in the Tenth Circuit's Badoni case. There it was said that the First Amendment gives one "no right to insist that in the pursuit of their own interests others must conform their conduct to his own religious

necessities." Id. at 792, quoting from Badoni v. Higginson, 638 F.2d at 179 quoting from Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2nd Cir. 1953) (L. Hand, J.).

But the court missed the point. Petitioners did not claim that environmental protection interfered with religious exercise but that the continued development of a tourist industry is not sufficiently compelling to allow government interference with religious ceremony.

In 1982 the park established permit registration so that visitors could be notified of emergencies arising outside the park. This service to visitors plays no role integral to park management, but the court refused to compromise even the minimal state interest involved in this service.

According to the Court's balancing test, "even if the state's interest weighs

heavier in this balance the regulation or restriction will be invalid if the state's interest can be achieved by less restrictive alternate means." Id. at 791. The court in the instant case did not "searchingly examine the interests that the State seeks to promote." 406 U.S. at 221. Nor did it examine less restrictive methods of construction and tourism development.

IV. PETITIONERS' REQUESTED RELIEF WOULD NOT VIOLATE THE ESTABLISHMENT CAUSE.

The district court below suggested, as did the Tenth Circuit in Badoni, that it might violate the Establishment Clause to grant Petitioners' request for relief. 541 F. Supp. at 794. To restrict construction and tourism at the sacred mountain would not, contrary to the District Court's suggestion, provide the "means and environment" for Petitioners' religious practices. Id. at 791,

quoting from Clark v. Wolff, 347 F. Supp. 887, 890 (D. Neb. 1972), aff'd 468 F.2d 252 (8th Cir. 1972) (delivery of extraordinary amounts of milk provided the means and environment to prisoners on a religiously impelled diet). The state does not provision the rituals at Bear Butte. The mere absence of construction and tourists does not make the mountain and its ceremonies sacred. Petitioners do not ask the state to exclude tourists from Bear Butte; they only Ask that South Dakota stop construction which desecrates the mountain and promotes additional tourism, and restore the Sacred Mountain to its former ritually pure condition. For the park authorities to weigh competing interests according to First Amendment standards is not an impermissible state entanglement with religion. Cf. Northwest Indian Cemetery Protective Ass'n v. Peterson, 522 F. Supp. 951, 954

(N.D. Cal 1982) ("The government must manage its property in a manner that does not needlessly impair the ability of its citizens to exercise their religious freedom.") and 565 F. Supp. 586, 597 (N.D. Cal. 1983).

The district court raised the specter of a "government-managed religious shrine" to refuse Petitioners relief from tourist interferences. 541 F. Supp. 785, 792 quoting from Badoni v. Higginson, supra, at 179. Certain active assistance, such as all-weather roads and running water, the court permitted. But mere limitation of tourist activity, which entails no active involvement in the religion, the court found to be an entanglement. The court overlooked that it is not a religious preference to provide worshipers the same facilities for exercising freedom of speech and assembly that other groups enjoy. Widmar v. Vincent, 454

U.S. 263 (1981). To reserve sacred sites for religious use, as tennis courts are reserved for tennis and classrooms for discourse, cannot violate the Establishment Clause. The Court has allowed mere instrumental concerns to outweigh even First Amendment interests in order to exclude the public and press from prisons, military bases, and libraries and undoubtedly public exclusion from numerous other kinds of government property would be upheld. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Greer v. Spock, 424 U.S. 828, 836 (1976).

Bear Butte has been dedicated to religious worship since before the Constitution was written. When, as here, the First Amendment weighs on the side of excluding the public, certainly the State has the power, if not the obligation, to

preserve that use of the property just as it would any mere instrumental use of the property against demands of access by the public.

If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair" (citation omitted) 454 U.S. at 274-75. Extending the state's general protection for purposes of preserving Bear Butte's pre-existing sacred character would not amount to "establishing" Petitioners' religions there. Such protection would only avoid "disestablishing" the historical sacred nature of Bear Butte and thereby avoid burdening Patitioners' free exercise of their religions.

The district court did not weigh Petitioners' evidence of infringement,

although the success of religious practices is a subject peculiarly within the Petitioners' knowledge. United States v. Lee, 455 U.S. 252 (1982). The court saw the burdens on Petitioners free exercise as assistance and their removal of these burdens as excessive entanglement. But removal of burdens on free exercise is not an establishment issue where less entanglement would result. See Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646 (1980). By terminating its construction program the state's positive assistance would be curtailed and its regulation would fall on tourists not religious ceremonies.

There is ground between the constitutional prohibition on establishment of religion by the state on the one hand and the implementation of guarantees of religious freedom on the other. Action required to comply with the constitutional

safeguards of religious freedom must fall within the permitted range of state involvement. Otherwise, whenever the government undertakes to manage property on which there is a religious shrine, religious practitioners would necessarily lose their freedom of worship if action by the government manager is required to prevent interference with the sacred use of the shrine.

CONCLUSION

The courts below failed to analyze and properly weigh the interest of the State of South Dakota in developing and promoting Bear Butte as a tourist attraction against the serious encroachment this development makes on the religious worship and ritual of Petitioners. In a case from the Ninth Circuit protection was granted a religious site of far less religious significance against state interests that were more compelling than the tourism

involved in the instant case. See Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983) appeal filed July 22, 1983 No. 83-2225 (9th Cir.). With the latter case now on appeal in the Ninth Circuit there is a potential division in the Circuits which would warrant granting the writ of certiorari in the present case in order to resolve the inconsistency between these cases.

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